Supreme Co. S.
FILED
04 84 JUL 12 2004
OFFICE OF THE CLERK

Case No. ____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2003

MICHAEL SARGA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

---

PETITION FOR WRIT OF CERTIORARI

ROBERT AUGUSTUS HARPER
Robert Augustus Harper Law Firm, P.A.
325 West Park Avenue
Tallahassee, Florida 32301-1413
(850) 224-5900/fax (850) 224-9800
FL Bar No. 127600/GA Bar No. 328360

MICHAEL ROBERT UFFERMAN
Robert Augustus Harper Law Firm, P.A.
FL Bar No. 114227

COUNSEL FOR PETITIONER

A. QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eleventh Circuit Court of Appeals clearly erred by reaching the merits of Petitioner Sarga's claims in denying the application for a certificate of appealability in contravention of the Court's criteria set forth in *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

2. Whether the conflict among the circuits regarding the treatment of filing and consideration of an application for a certificate of appealability creates a constitutional need for the Court to accept certiorari review and adopt a uniform procedure for the courts of appeals.

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

TABLE OF CONTENTS

A. QUESTIONS PRESENTED FOR REVIEW ii

B. PARTIES INVOLVED iii

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES iv

1. Table of Contents iv

2. Table of Cited Authorities vi

D. CITATION TO OPINION BELOW 2

E. BASIS FOR JURISDICTION 2

F. STATUTORY AND RULE PROVISIONS INVOLVED 2

1. Statutory Provisions 2

2. Local Rules of Procedure 3

G. STATEMENT OF THE CASE 5

H. REASONS FOR GRANTING THE WRIT 7

1. The Decision of the Court of Appeals is Erroneous 7

2. The Eleventh Circuit Court of Appeals' local rule of procedure for obtaining a certificate of appealability conflicts with

Ninth Circuit's Local Rule 28

I. CONCLUSION 30

TABLE OF CITED AUTHORITIES

1. Cases

Boykin v. Alabama, 395 U.S. 238 (1969) 26

Gaddy v. Linahan, 780 F.2d 935 (11th Cir. 1986) 24

Hill v. Lockhart, 474 U.S. 52 (1985) 27

Holloway v. Arkansas, 435 U.S. 475 (1978) 23

Miller-El v. Cockrell, 537 U.S. 322 (2003) 7, 8, 10

Slack v. McDaniel, 529 U.S. 473 (2000) 8, 9

Spreitzer v. Peters, 114 F.3d 1435 (7th Cir. 1997) 17

Strickland v. Washington, 466 U.S. 668 (1984) 10

United States v. Alvarez, 580 F.2d 1251 (5th Cir. 1978) 22

United States v. Buckles, 843 F.2d 469 (11th Cir. 1988) 26

United States v. Fahey, 769 F.2d 829 (1st Cir. 1985) 17

United States v. Ming He, 94 F.3d 782 (2d Cir. 1996) 14

Wheat v. United States. 486 U.S. 153 (1988) 23

Wood v. Georgia, 450 U.S. 261 (1981) 17

2. Statutes, Rules and Constitutional Provisions

Fed. R. App. P. 4 4

Fed. R. App. P. 22(b) 4

Fed. R. App. P. 22(b)(1) 28

Fed. R. Crim. P. 11 26

U.S. Const. amend. VI 10

9th Cir. Rule 22-1 ..... 4, 28

11th Cir. Rule 22-1 ..... 3, 28

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2253 ..... 2, 7, 9, 30

28 U.S.C. § 2253(c) 7, 9

28 U.S.C. § 2253(c)(1) 7

28 U.S.C. § 2253(c)(2) 4

28 U.S.C. § 2254 ..... 3, 4

28 U.S.C. § 2255 ..... 2, 3, 4, 5

3. Other

USSG § 3C1.1 12

USSG § 5K1.1 15

Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2003

MICHAEL SARGA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

The Petitioner, MICHAEL SARGA, respectfully prays the Court to issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on 27 January 2004, (A-3),[1] rehearing/reconsideration denied on 12 April 2004 (A-1). The Eleventh Circuit denied Petitioner Sarga's application for a certificate of appealability (COA)

[1] References to the Appendix will be made by the designation "A" followed by the appropriate page number.

concerning the denial of his habeas petition filed pursuant to 28 U.S.C. 2255.

D. CITATION TO OPINION BELOW

Sarga v. United States, Case No. 03-14410-F (11th Cir. Jan. 27, 2004) (unpublished order) (A-3).

E. BASIS FOR JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. § 1254(1) to review the final judgment of the United States Court of Appeals for the Eleventh Circuit rendered on 27 January 2004 (A-3), and finalized on 12 April 2004 when rehearing/reconsideration was denied. (A-1).

F. STATUTORY AND RULE PROVISIONS INVOLVED

1. Statutory Provisions.

28 U.S.C. § 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of

such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

. . . .

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

2. Local Rules of Procedure.

a. Eleventh Circuit Rule 22-1 Certificate of Appealability

(a) In all appeals in cases brought pursuant to 28 U.S.C. §§ 2254 or 2255, counsel shall apply to the district court for a ruling on a certificate of appealability.

(b) The district court shall promptly send to the court of appeals upon issuance a certificate of appealability or statement that such a certificate should not issue.

(c) When an application for a certificate of appealability is acted upon by the district court, but the applicant has not filed a notice of appeal:

(1) the district court shall construe the application for a certificate of appealability as also a notice of appeal, and file it as such; and

(2) if the district court denies a certificate of appealability, and at the time of docketing the appeal in the court of appeals the applicant has not filed a renewed application for a certificate of appealability in the court of appeals, the application denied by the district court (construed and filed as a notice of appeal) shall be construed by the court of appeals as a renewed application for a certificate of appealability.

(d) An application to the court of appeals for a certificate of

appealability shall be considered by a single circuit judge. The denial by a single circuit judge of a certificate of appealability may be the subject of a motion for reconsideration but may not be the subject of a petition for panel rehearing or a petition for rehearing en banc.

b. Ninth Circuit Rule 22-1 Certificate of Appealability

(a) General Procedures. Petitioners appealing the district court's judgment in either a 28 U.S.C. §§ 2254 and 2255 proceeding should follow the procedures set forth in Federal Rules of Appellate Procedure 4 and 22(b). A motion for a certificate of appealability ("COA") must first be considered by the district court. If the district court grants a COA, the court shall state which issue or issues satisfy the standard set forth in 28 U.S.C. § 2253(c)(2). The court of appeals will not act on a motion for a COA if the district court has not ruled first.

. . .

(d) Denial in Full by District Court. If the district court denies a COA as to all issues, petitioner may file a motion for a COA in the court of appeals within thirty-five (35) days of the district court's entry of its order (1) denying a COA in full, or, (2) denying a timely filed post-judgment motion, whichever is later. If petitioner does not file a COA motion with the court of appeals after the district court denies a COA motion in full, the court of appeals will deem the notice of appeal to constitute a motion for a COA. If the court appoints counsel to represent petitioner, counsel will be given additional time to file a renewed COA motion.

If petitioner files a motion for a COA with the court of appeals, respondent may, and in capital cases with no pending execution date shall, file a response to the motion for a COA within thirty-five (35) days from service of the COA motion. In capital cases where an execution date is scheduled and no stay is in place, respondent shall file a response as soon as practicable after the date petitioner's motion is served or, if no motion is filed, as soon as practicable after the district court's entry of its order denying a COA.

If, after the district court has denied a COA in full, the motions panel also denies a COA in full, petitioner, pursuant to

Circuit Rule 27-10, may file a motion for reconsideration.

G. STATEMENT OF THE CASE

1. Course of Proceedings Below.

On 16 November 1998, Petitioner Sarga timely filed a petition for a writ of habeas corpus in the Middle District of Florida pursuant to 28 U.S.C. § 2255. Upon order of the court, Petitioner Sarga filed an amended petition on 09 October 2001. Petitioner Sarga raised eight claims in the petition: (1) defense counsel rendered ineffective assistance of counsel as a result of a conflict of interest, in that defense counsel previously represented codefendant Donald Shreve, the Government's chief witness against Petitioner Sarga; (2) defense counsel rendered ineffective assistance as a result of a conflict of interest regarding Petitioner Sarga's business dealings with counsel, and a truthful, complete debriefing could have led to either criminal or ethical liability for counsel; (3) defense counsel rendered ineffective assistance by failing to attend the debriefing with Petitioner Sarga; (4) defense counsel rendered ineffective assistance by advising Petitioner Sarga to testify at the sentencing hearing; (5) the prosecutor engaged in prosecutorial misconduct in

that she was aware of defense counsel's existing conflicts of interest and she failed to disclose the conflicts to the court or Petitioner Sarga; (6) the prosecutor engaged in prosecutorial misconduct when she debriefed Petitioner Sarga without counsel present; (7) appellate counsel rendered ineffective assistance by failing to raise the issues set forth above on direct appeal, and (8) defense counsel rendered ineffective assistance when he permitted Petitioner Sarga to believe that he should be debriefed even though: (a) the terms of the cooperation agreement were not finalized, (b) Petitioner Sarga believed that certain guarantees about his cooperation agreement had been given, (c) counsel gave incorrect advice to Petitioner Sarga resulting in Petitioner Sarga's plea not being intelligently entered, (d) counsel failed to secure the presence of Petitioner Sarga at a hearing regarding the motion to enforce plea agreement, and (e) counsel failed to fully advise Petitioner Sarga regarding the details of the cooperation agreement. An evidentiary hearing was held on 28-29 January 2003. On 21 March 2003, the magistrate judge issued a Report and Recommendation, concluding that Petitioner Sarga's habeas petition should be denied. (A-12). On 02 July 2003, the

district court entered an order adopting the magistrate judge's Report and Recommendation; as a result, the habeas petition was denied. (A-10). Petitioner Sarga timely appealed the order and requested the district court to issue a COA. The district court denied the motion for COA on 22 November 2003. (A-4).

2. Statement of the Facts. The facts are set forth in the magistrate judge's fifty-three-page Report and Recommendation (A-12) and are hereby incorporated by reference.

H. REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals is Erroneous.

As explained below, the Eleventh Circuit Court of Appeals' decision to deny Petitioner Sarga's application for a COA runs counter to the established purpose of 28 U.S.C. § 2253[2] and the decisions of this Court. In *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003), the Court observed that a COA will issue only if the requirements of § 2253 have been satisfied. "§ 2253(c) permits the issuance of a COA only where a petitioner has made a substantial

---

[2] The provisions of 28 U.S.C. § 2253(c)(1) were included in the Anti-Terrorism and Effective Death Penalty Act of 1996.

showing of the denial of a constitutional right." *Id.* "Under the controlling standard, a petitioner must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Id.*

The Court in *Miller-El* recognized that a determination as to whether a COA should be issued "requires an overview of the claims in the habeas petition and a general assessment of their merits." *Id.* The Court recognized that the question to be determined is whether a district court's resolution of a habeas petition was debatable amongst jurists of reason. The Court reasoned:

> This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.
>
> To that end, our opinion in *Slack* [*v. McDaniel*, 529 U.S. 473 (2000),] held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it

> believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner has already failed in that endeavor.

Id. at 336-37. The Court proceeded to stress that the issuance of a COA must not be merely a matter of course. The Court clearly defined the test for issuing a COA as follows:

> A prisoner seeking a COA must prove "something more than the absence of frivolity" or the existence of mere "good faith" on his or her part. *Barefoot*, at 893. We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in *Slack*, "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 529 U.S. at 484.

Id. at 338.

Pursuant to the test articulated in *Miller-El*, an overview of

the claims set forth in Petitioner Sarga's habeas petition confirms that the constitutional claims are debatable amongst jurists of reason.

1. **Ineffective Assistance of Counsel.** In *Strickland v. Washington,* 466 U.S. 668, 686 (1984), the Court established that implicit in the Sixth Amendment's guarantee of a criminal defendant's right "to have the Assistance of Counsel for his defence," U.S. Const. amend. VI, is the right to the effective assistance of counsel. Petitioner Sarga raised several claims of ineffective assistance of counsel in his habeas petition which satisfy the *Miller-El* test. The actions of defense counsel were the direct result of the conflict of interest that counsel had with his representation of Petitioner Sarga and counsel's previous representation of the Government's chief witness, Donald Shreve. At the time of the charges in the instant case, Mr. Shreve was a codefendant of Petitioner Sarga in a federal North Carolina indictment involving a related cocaine charge.

First, defense counsel permitted Petitioner Sarga to be debriefed without having an agreement, or understanding, on the scope or parameters of the debriefing, which resulted in the

Government delving into matters to which were prejudicial to the sentencing issues. When he declined to go further, Petitioner Sarga was at odds with the Government. Prejudice resulted in the Government moving to revoke the acceptance of responsibility adjustment.

Second, defense counsel permitted Petitioner Sarga to be debriefed without defense counsel being present. With defense counsel present, the possibility would have existed that some parameters would have been set and that the debriefing would have gone forward as opposed to the stalemate which occurred.

Third, because of the failed debriefing and the position of the prosecutor as a result of that failure, defense counsel was unable to negotiate any oral or written plea agreement. Counsel advised Petitioner Sarga to enter an open guilty plea. This third deficiency is a direct result of the first two deficiencies set forth above.

As a result of the failed debriefing, the Government argued to increase Petitioner Sarga's sentencing range by representing that he was subject to a role enhancement due to his alleged leadership role. In an attempt to challenge the role enhancement, defense

counsel advised Petitioner Sarga to testify at the sentencing hearing, a fourth instance of ineffective assistance of counsel. Petitioner Sarga relied on the advice of defense counsel and took the witness stand. Defense counsel opened the door for the Government to examine Petitioner Sarga regarding his finances and assets, which led to: (1) an allegation of perjury; (2) the district judge's request for a transcript of the sentencing hearing and a continuance to review said transcripts; (3) the Government procuring and executing an "open-ended" search warrant for Petitioner Sarga's family's homes, which, ultimately revealed "new evidence" for the Government; and (4) the Government's filing of a request for an additional two-level enhancement for obstructing or impeding the administration of justice pursuant to U.S.S.G. § 3C1.1 based on Petitioner Sarga's "materially false statements to the court" at the sentencing hearing.

It is an essential part of a defense attorney's job to advise his client in the decision to take the witness stand. Defense counsel failed to evaluate the effect Petitioner Sarga would make on the stand. Counsel never prepared Petitioner Sarga to testify and never explained to Petitioner Sarga that cross-examination was a dangerous

juncture at which he would be compelled to discuss the very topics defense counsel had negotiated with the Government vigorously to keep out of the debriefing session and the ultimate sentencing process.

The advice that Petitioner Sarga testify at the sentencing hearing caused Petitioner Sarga to lose the role enhancement issue, which acted to counter the three-level reduction for acceptance of responsibility. Also, Petitioner Sarga incurred the additional two-level enhancement for obstruction of justice. Rather than instructing Petitioner Sarga to testify, defense counsel should have successfully attacked the role enhancement simply by calling available witnesses to the stand. Their testimony would have made it clear that Petitioner Sarga was actually a minimal participant in the overall conspiracy.

The errors compounded each other, resulting in a domino effect. Had the debriefing been successful, the role enhancement would never have been an issue in the first place. There would have been a plea agreement in place. Had a plea agreement been in place, there would have been no need for Petitioner Sarga to testify at the

sentencing hearing. Had Petitioner Sarga not testified, his sentence would not have been increased pursuant to the obstruction of justice enhancement. Ultimately, had Petitioner Sarga proceeded *pro se* and simply pled guilty, without "assistance of counsel," he would been better off than he is today. When *no assistance of counsel* would have been better than the assistance provided, the assistance must be deemed ineffective.

In his habeas petition, Petitioner Sarga relied on *United States v. Ming He*, 94 F.3d 782 (2d Cir. 1996), wherein the Second Circuit Court of Appeals examined a policy in the Eastern District of New York that a cooperating defendant be debriefed without counsel present. The court held that "the government's standard practice in this district of conducting debriefing interviews outside the presence of counsel is inconsistent, in our view, with the fair administration of criminal justice." *Id.* at 785. The court explained:

> Defendant and his counsel should be given reasonable notice of the time and place of the scheduled debriefing so that counsel might be present. A cooperating witness's failure to be accompanied by counsel at debriefing may later be construed as a waiver, providing defendant and counsel have had notice so that the consequences of

> counsel's failure to attend could be explained to defendant.

Id. at 794. The court added that the government may not "conduct debriefing interviews without giving reasonable advance notice to the defendant, through his attorney, in order to permit him to be represented if he so chooses." *Id.*

In *Ming He*, the court found that defendant's failure to be represented at the debriefing was harmful error. The prosecutor in *Ming He* later claimed that the defendant did not provide full disclosure at the debriefing. At the sentencing hearing, despite the Government's § 5K1.1 motion, the district court only marginally departed downward from the guideline range. The district court reasoned that the defendant was evasive at the debriefing. The Second Circuit reversed, stating:

> [S]ince the district court explicitly relied on defendant's lack of candor, its sentencing error was not harmless. Plainly, this factor influenced the sentencing court's selection of the sentence.

Id. at 795. Petitioner Sarga submits that *Ming He* is applicable to his case and further supports his claim that counsel was ineffective for failing to be present at the debriefing. Pursuant to *Ming He*,

Petitioner Sarga did not waive his right to have counsel present at the debriefing.

The magistrate judge below held that "*Ming He* is distinguishable from this case because it was Sarga's untruthful testimony at the sentencing hearing, not the failed debriefing, which led to his life sentence." (A-71). The magistrate judge added that there was no prejudice because "the prosecutor made it clear that [defense counsel] could not be present" at the debriefing. (A-71). The magistrate judge relied on the very policy that the court in *Ming He* held was impermissible.

For all of these reasons, Petitioner Sarga submits that whether or not he received ineffective assistance of counsel and whether or not he was prejudiced by counsel's ineffectiveness are matters debatable amongst jurists of reason. A COA should have been issued as to Petitioner Sarga's claims of ineffective assistance of counsel.

2. Conflict of Interest. Where a right to counsel exists, there is a correlative Sixth Amendment right to "representation that is free from conflicts of interest." *Wood v.*

Georgia, 450 U.S. 261, 271 (1981). "It is well settled that a criminal defendant is entitled to counsel whose undivided loyalties lie with the client." *Spreitzer v. Peters*, 114 F.3d 1435, 1450 (7th Cir. 1997).

To prevail on a claim of conflict of interest, a petitioner must establish: (1) some plausible alternative defense strategy that might have been pursued, (2) the alternative strategy was reasonable, and (3) a link between the conflict and the decision to forgo the alternative strategy. *See United States v. Fahey*, 769 F.2d 829, 829 (1st Cir. 1985). In the instant case, Petitioner Sarga was debriefed without the benefit of either counsel or a plea agreement. A complete debriefing may have uncovered counsel's improper personal dealings with Petitioner Sarga. Moreover, it was in counsel's interest to convince Petitioner Sarga to enter a plea to prevent the possibility of having to cross-examine counsel's old client (Donald Shreve) at trial.

Defense counsel was clearly the counsel of choice for members of the Tampa-based drug group. Counsel and his firm had represented at least four individuals in a 1975 Tampa federal prosecution, a case in which the charges against Petitioner Sarga

were dismissed. Almost contemporaneously, defense counsel represented eighteen members of the organization in a 1975 federal prosecution in Georgia. Not only did defense counsel formerly represent Pedro Alvarez, a defendant in the Georgia case, he also represented Donald Shreve in that matter, the very codefendant *in the instant case* who was prepared to testify against Petitioner Sarga at trial. Due to this conflict, defense counsel encouraged Petitioner Sarga to enter a plea of guilty in order to avoid having to cross-examine Mr. Shreve at trial.

Additionally, a conflict of interest existed insofar as defense counsel had a vested interest in assuring that a second proffer session never materialized. The evidentiary hearing reveals that defense counsel was involved in an alleged money laundering scheme, questionable land deals, and receiving large sums of cash from clients before trouble was ever on the horizon. All of this information should have, and would have, been divulged at a full debriefing of Petitioner Sarga.

Defense counsel's conflict of interest concerning Mr. Shreve and the conflict of interest in hiding his own questionable financial

deals precipitated one blunder after another. Defense counsel was aware that the substantial assistance policy of the Department of Justice required full disclosure of *all* of the defendant's criminal activities, identification of cohorts, and a complete recapitulation of assets. Defense counsel was also mindful that recitation of those facts would invariably lead to the question "what did you do with the money you made selling drugs?," whereupon defense counsel's questionable cash deals and land deals with Petitioner Sarga would have been disclosed. Defense counsel pursued a limited cooperation agreement, which is rarely, if ever, approved by the Department of Justice, where in exchange for information about the incidents which were the subject of the instant indictment, Petitioner Sarga would receive a recommendation from the prosecutor for a four-level sentence reduction. A condition of the limited cooperation was that Petitioner Sarga would not discuss activities that occurred more than three years prior to the agreement and that he would not talk about family members. Counsel encouraged this position. Petitioner Sarga was given advice that the four-point reduction, *which would be obtained by this limited cooperation*, would result in a sentence of

approximately ten years' imprisonment. Counsel advised limited cooperation to Petitioner Sarga.

Placating Petitioner Sarga was a fortuitous byproduct of counsel's primary motive in encouraging Petitioner Sarga not to fully disclose according to requirements of law. Defense counsel was willing for Petitioner Sarga to risk (and receive) a long period of incarceration to *protect counsel* from negative consequences which might flow from revelation of counsel's questionable financial dealings with narcotics clients over the last two decades.

There was an exchange of letters between the prosecutor and defense counsel in which counsel actually attempted to hammer out a disclosure deal where defense counsel would not be discussed. Although no understanding between the parties was reached, the prosecutor nonetheless proceeded with the debriefing of Petitioner Sarga at a time when she knew – from counsel's letter to her – that defense counsel would be out of town. Petitioner Sarga was unaware at the time of the debriefing that the prosecutor viewed the interview as a confession to which no agreement attached. Petitioner Sarga was never advised by his counsel that the debriefing was unlimited.

He was never informed that the fruits of the interview would be used against him, ultimately resulting in the life sentence being imposed. Rather, defense counsel left Petitioner Sarga with the mistaken impression that the prosecutor would recommend a reduction of sentence in exchange for disclosure of the facts of the instant matter with nothing more.

Petitioner Sarga submits that for purposes of obtaining a COA, it is subject to fair debate that he established the elements of his conflict of interest claim. Plausible alternative tactics should have been pursued. Counsel should have advised Petitioner Sarga to fully disclose. Counsel should have kept Petitioner Sarga accurately informed of the status of negotiations with the prosecutor. Finally, defense counsel could have simply recommended that Petitioner Sarga proceed to trial. By choosing to enter a guilty plea in light of the unfavorable legal landscape following the failed attempt at a "controlled limited" debriefing, defense counsel unilaterally decided to relinquish Petitioner Sarga's right to make the Government prove in a court of law every element of the charge against him, in part because of the problems which would be inherent to defense counsel

in the trial.

However, by going to trial, defense counsel would have risked the possibility of being disqualified due to the conflict of interest with Government witness Shreve. Had the trial proceeded, counsel risked having his own financial dealings with his client revealed and possible consequences to him, both criminal and professional. Unless Shreve waived his attorney-client confidentiality, defense counsel could not impeach him with information learned in the course of representing him.

It is difficult to imagine how matters could have worked out worse for Petitioner Sarga. In the 1975 case of *United States v. Alvarez*, 580 F.2d 1251 (5th Cir. 1978), the same attorney also indulged patent representation conflicts. Counsel emerged unscathed. The tactics of defense counsel are not reasonable under the facts of this case, especially where Petitioner Sarga was facing a life sentence and all of his codefendants in this case ultimately entered into favorable plea and cooperation agreements.

Jurists of reason could fairly debate the alleged conflict of interest violation. "[I]n a case of joint representation of conflicting

interests the evil . . . is in what the advocate finds himself compelled to *refrain* from doing . . . ." *Wheat v. United States*. 486 U.S. 153, 159-60 (1988) (emphasis added) (quoting *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978)). The truth that inaction is the essence of a conflict of interest problem is borne out in the instant case. Had trial counsel advised Petitioner Sarga to proceed to trial, he would likely have been placed in the untenable position of cross-examining one of his former clients about the activities of a drug organization with which he was already intimately familiar due to his twenty-year history of representing in turn and in tandem its many members. In direct disregard for the well settled principles of ethics and conflict of interest law reiterated in *Alvarez*, trial counsel recognized no limits on his employment and consequently accepted employment representing a potential client with interest adverse to a former client. *See Alvarez*, 580 F.2d at 1254-1255.

In evaluating counsel's performance under a conflict of interest claim, the Court in *Alvarez* recognized an important distinction between claims of ineffectiveness based on conflict of interest and other types of ineffectiveness claims: "Unlike

competency of representation, where an attorney's conduct may fall anywhere along a continuum ranging from incompetent to superlative, conflict-laden representation is not susceptible of such fine gradations." *Alvarez*, 580 F.2d at 1257.

The alternative tactics set forth above are clearly, incontrovertibly, and inherently in conflict with defense counsel's other loyalties and personal interests. Jurists of reason could fairly debate whether defense counsel's representation of Petitioner Sarga presented an actual conflict of interest that adversely affected counsel's representation of Petitioner in violation of his right to effective assistance counsel.

3. **Involuntary Plea.** "The fourteenth amendment due process clause requires that a plea of guilty be knowingly and voluntarily entered because it involves a waiver of a number of the defendant's constitutional rights." *Gaddy v. Linahan*, 780 F.2d 935, 943 (11th Cir. 1986). Due to the unusual events that occurred both before and after Petitioner Sarga entered his plea, his plea was not knowing, voluntary, or intelligent.

Between the plea hearing and the sentencing hearing, several

attempts were made by Petitioner Sarga to withdraw the plea. The first two days of sentencing hearings were held 29 and 30 December 1992. The sentencing hearing was then postponed while the district court reviewed the transcripts of the first two days of the proceedings. On 21 and 27 January 1992 the Government filed motions for extensions to file supplemental sentencing memorandums. Defense counsel filed an objection to the Government's motions for extensions and, on 12 February 1993, the trial court construed the objection as a "motion to withdraw [the] guilty plea and denied the motion as premature." Thereafter, Petitioner Sarga was sentenced on 28 April 1993. Then, on 07 May 1993, defense counsel filed a post-sentencing motion to withdraw the guilty plea, along with the notice of appeal of the life sentence and fine.

Initially it is noted that the district court never entered an order accepting Petitioner Sarga's guilty plea. The magistrate judge held that the court "implicitly accepted Sarga's guilty plea," but Petitioner Sarga submits that implicit acceptance is not sufficient pursuant to Federal Rule of Criminal Procedure 11. (Doc 470 - Pg

51). Petitioner Sarga scheduled the entry of a plea of guilty before the Honorable Elizabeth A. Jenkins. At the conclusion of the colloquy, Magistrate Jenkins made it clear to Petitioner Sarga that she was not accepting the plea.

On several occasions prior to sentencing, Petitioner Sarga moved to withdraw his plea of guilty, but the district court refused. "Fair and just reason" for the withdrawal of the guilty plea, as required by Rule 32(3), existed in Petitioner Sarga's case, at least at the point that the Government moved to continue the sentencing hearing after Petitioner Sarga's testimony. *See United States v. Buckles*, 843 F.2d 469, 471-74 (11th Cir. 1988). Petitioner Sarga was taken by surprise at the sentencing hearing when the Government cross-examined him regarding assets and then attempted to add the obstruction of justice enhancement. What started out as a purported plea agreement and debriefing turned into an ambush.

Petitioner Sarga's case falls outside the normal legal landscape. *Boykin v. Alabama*, 395 U.S. 238 (1969), and its circuit hybrids do not address a situation where a person pleads guilty without knowledge that the Government may subsequently seek

open-ended search warrants and gain access to "new evidence" to introduce at a continued sentencing hearing to increase the guideline range to the life bracket. Pursuant to *Hill v. Lockhart*, 474 U.S. 52 (1985), there is reasonable probability that, but for defense counsel's errors, Petitioner Sarga would have not pled guilty and would have insisted on going to trial. Had defense counsel warned Petitioner Sarga that he could be subject to a life sentence as a result of the Government's cross-examination of him on the witness stand, Petitioner Sarga would have insisted on proceeding to trial. In fact, had Petitioner Sarga simply proceeded *pro se* and pled guilty without any assistance of counsel, even if the role enhancement had become an issue, had he not contested it, he would have been sentenced at level 38, two levels under what he received with defense counsel's ineffective assistance.

Petitioner Sarga submits that whether or not his plea was entered knowingly is a matter debatable amongst jurists of reason. A COA should be issued as to Petitioner Sarga's involuntary plea claim.

Based on the forgoing, the Eleventh Circuit clearly erred by

denying Petitioner Sarga's application for a COA. The issues raised in Petitioner Sarga's habeas petition were matters debatable amongst jurists of reason.

2. The Eleventh Circuit Court of Appeals' local rule of procedure for obtaining a certificate of appealability conflicts with the Ninth Circuit's local rule.

The federal circuit courts are in conflict regarding the procedure for obtaining a COA. Federal Rule of Appellate Procedure 22(b)(1) states that "[i]f the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate." However, the rule does not provide a time limit for making such a request.

Eleventh Circuit Rule 22-1(c)(2) states that "if the district court denies a certificate of appealability, and at the time of docketing the appeal in the court of appeals the applicant has not filed a renewed application for a certificate of appealability in the court of appeals, the application denied by the district court (construed and filed as a notice of appeal) shall be construed by the court of appeals as a renewed application for a certificate of appealability." However, the rule does not set forth a time period for

filing a renewed application for a COA in the court of appeals.

By comparison, Ninth Circuit Rule 22-1(d) provides:

> If the district court denies a COA as to all issues, petitioner may file a motion for a COA in the court of appeals *within thirty-five (35) days of the district court's entry of its order (1) denying a COA in full, or, (2) denying a timely filed post-judgment motion, whichever is later.*

(Emphasis added.) The procedure in the Ninth Circuit is in conflict with the procedure in the Eleventh Circuit, as a petitioner in the Ninth Circuit is on notice as to how much time he or she has to file a motion for a COA in the appellate court. In contrast to the procedure in the Ninth Circuit, it is not clear how long a petitioner in the Eleventh Circuit has to file a motion for a COA. If a petitioner filed the motion on the thirty-fifth day (as permitted in the Ninth Circuit), it appears, pursuant to Eleventh Circuit Rule 22-1 that the Court will have already ruled on the issue without the benefit of a written motion. Further, no guidance is provided as to whether the notice of appeal precedes or follows the COA. Petitioner Sarga respectfully requests the Court to grant the writ in order to allow this issue to be further briefed by the parties, thereby affording the Court

the opportunity to provide guidance and uniformity in this otherwise unsettled procedural arena.

I. CONCLUSION

The Petitioner respectfully requests the Court to grant the writ and correct the Eleventh Circuit's interpretation of 28 U.S.C. 2253.

Respectfully Submitted,

ROBERT AUGUSTUS HARPER
Robert Augustus Harper Law Firm, P.A.
325 West Park Avenue
Tallahassee, Florida 32301-1413
(850) 224-5900/fax (850) 224-9800
FL Bar No. 127600/GA Bar No. 328360

MICHAEL ROBERT UFFERMAN
Robert Augustus Harper Law Firm, P.A.
FL. Bar No. 114227

COUNSEL FOR PETITIONER

Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2003

MICHAEL SARGA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Appendix to
Petition for Writ of Certiorari
to the Eleventh Circuit Court of Appeals

ROBERT AUGUSTUS HARPER
Robert Augustus Harper Law Firm, P.A.
325 West Park Avenue
Tallahassee, Florida 32301-1413
(850) 224-5900/fax (850) 224-9800
FL Bar No. 127600/GA Bar No. 328360

MICHAEL ROBERT UFFERMAN
Robert Augustus Harper Law Firm, P.A.
FL Bar No. 114227

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

No.	Document(s)	Page
1.	Eleventh Circuit court's order denying Appellant's motion for reconsideration, dated 12 April 2004	A-1
2.	Eleventh Circuit court's order denying Appellant's motion for a certificate of appealability, dated 27 January 2004	A-3
3.	District court's order denying Appellant's certificate of appealability, dated 22 November 2003	A-4
4.	District court's order denying Appellant's certificate of appealability, dated 03 September 2003	A-8
5.	District court's order denying Defendant's motion to vacate, set aside, or correct an allegedly illegal sentence, dated 02 July 2003	A-10
6.	Magistrate judge's Report and Recommendation, dated 21 March 2003	A-12

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-14410-F

D. C. Docket No.

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

MICHAEL SARGA.

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(12 April 2004)

Before: **TJOFLAT and MARCUS, Circuit Judges.**

BY THE COURT:

Appellant has filed a motion for reconsideration of this Court's order dated January 27, 2004. Upon reconsideration, appellant's motion for a certificate of appealability is DENIED because appellant has failed to make the requisite showing. *See* 28

U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336-37, 123 S. Ct. 1029, 1039, 154 L. Ed.2d 931 (2003); *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S. Ct. 1595, 1600-01, 146 L.Ed.2d (2000); *Hill v. Lockhart*, 474 U. S. 52, 58-59, 106 S. Ct. 366, 370, 88 8L. Ed.2d 203 (1985); *Strickland v. Washington*, 466 U. S. 668, 697, 104 S. Ct. 2052, 2069, 80 L. Ed.2d 674 (1984); *United States v. Frady*, 456 U. S. 152, 167-68, 102 S. Ct. 1584, 1594, 71 L.Ed. 2d 816 (1982); *Cuyler v. Sullivan*, 446 U. S. 335, 350, 100 S. Ct. 1708, 1719, 64 L.Ed.2d 333 (1980); *Caderno v. United States*, 256 F.3d 1569, 1572 (11th Cir. 1994); *Tejada v. Dugger*, 941 F.2d 1151, 1559 (11th Cir. 1991). Appellant's "Motion to Incorporate 'Motion to Reconsider' With Circuit Precedent *Gallego v. U.S.*, 174 F.3d 1196 (1999)" is DENIED. *See Walker*, 10 F.3d at 1572.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-14410-F

D. C. Docket No.

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

MICHAEL SARGA.

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(27 January 2004)

ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-14410-F

D. C. Docket No.

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

MICHAEL SARGA.

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(22 November 2003)

ORDER:

After conducting an evidentiary hearing on Defendant Michael Sarga (Sarga's) 28 U.S. C. § 2255 motion to vacate, set aside, or correct an allegedly illegal sentence, United States Magistrate Judge Elizabeth A. Jenkins submitted her Report and Recommendation recommending that the motion to vacate be denied.

Sarga filed objections. After consideration of the United States Magistrate Judge's recommendation and Sarga's objections, the undersigned United States District Judge overruled Sarga's objections and adopted the Magistrate Judge's recommendation to deny the motion to vacate.

Sarga, who had been represented by retained counsel Mary Catherine Bonner at the evidentiary hearing and in subsequent filings relative to the motion to vacate, filed a *pro se* Notice of Appeal after the Court denied his 28 U.S.C. § 2255 motion for relief. Pursuant to *Edwards v. United State*, 114 F.3d 1083 (11th Cir. 1997), the Court construed the Notice of Appeal as a request for a certificate of appealability and denied the request. The Court relied on *Slack v. McDaniel*, 529 U.S. 473, 475 (2000).

Subsequently, Attorney Bonner filed a motion on behalf of Sarga to reconsider the denial of the request for certificate of appealability. (Doc. No. 478) Attorney Bonner requested that, because the issue of the certificate of appealability had not been fully briefed, and because the failure to fully brief the issue was not Sarga's fault, the Court vacate or stay the effect of the order denying

the certificate of appealability and grant Sarga 15 days in which to file a motion for certificate of appealability and fully brief the issue.

In addition, Attorney Bonner filed a motion to withdraw. (Doc. No. 479) The Court granted the motion to vacate the order denying Sarga's construed request for certificate of appealability and allowed Sarga to file a "fully-briefed" motion for certificate of appealability on or before October 24, 2003. The Court also granted Attorney Bonner's motion to withdraw.

On October 20, 2003, Robert Augustus Harper and Michael Robert Ufferman, Esq. filed a notice of appearance for appeal purposes (Doc. No. 482); and on October 24, 2003, filed a motion for a certificate of appealability pursuant to Title 28 U.S. C. § 2253.

To merit a certificate f appealability, Sarga must show that reasonable jurists would find debatable (1) the merits of an underlying claim, and (2) the procedural issues he seeks to raise. *See* 28 U.S. C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. After 473, 475 (2000)[1] Sarga has failed to meet this standard. Therefore, Sarga has

---

[1]*Miller-El v. Cockrell*, 123 S. Ct. 1029 (2003) does not change the *Slack* standard. *See Ziegler v. Crosby*, 345 F. 3d 1300, 1303 n.4 (11th Cir. 2003).

failed to satisfy the *Slack* test.

Accordingly, the Court orders:

That Sarga's motion for certificate of appealability pursuant to Title 28 U.S.C. § 2253 (Doc. No. 482) is **denied**.

ORDERED in Tampa, Florida, on November 22, 2003.

/s/ Steven D. Merryday
Steven D. Merryday
UNITED STATES DISTRICT JUDGE

cc: AUSA Anthony Porcelli
Robert Augustus Harper, Esq.
Michael Robert Ufferman, Esq.
Michael Sarga
United States Court of Appeals for the Eleventh Circuit
SA/sm

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-14410-F

D. C. Docket No.

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

MICHAEL SARGA.

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(03 September 2003)

ORDER:

The Court denied Defendant Michael Sarga (Sarga's) 28 U.S.C. § 2255 motion to vacate, set aside, or correct an allegedly illegal sentence. Sarga has filed a Notice of Appeal. Pursuant to *Edwards v. United State*, 114 F.3d 1083 (11th Cir. 1997), the Court construes the Notice of Appeal as a request for a certificate of

appealability.

To merit a certificate of appealability, Sarga must show that reasonable jurists would find debatable (1) the merits of an underlying claim, and (2) the procedural issues he seeks to raise. *See* 28 U.S. C. 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 475 (2000). Sarga has failed to meet this standard. Therefore, Sarga has failed to satisfy the *Slack* test.

Accordingly, the Court orders:

That Sarga's construed request for a certificate of appealability (Doc. No. 476) is denied.

ORDERED in Tampa, Florida on September 3, 2003.

/s/ Steven D. Merryday
Steven D. Merryday
UNITED STATES DISTRICT JUDGE

SA/sm

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-14410-F

D. C. Docket No.

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

MICHAEL SARGA.

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(02 July 2003)

ORDER

On April 1, 2002, pursuant to 28 U.S.C. § 636 and Rules 6.01(b) and (c), of the Local Rules for the Middle District of Florida, the Court referred to the United States Magistrate Judge for consideration and preparation of a report and recommendation Sarga's amended motion and supporting memorandum to vacate, set

aside, or correct an allegedly illegal sentence (Docs. 423, 425). Magistrate Judge Elizabeth Jenkins conducted an evidentiary hearing on January 28 and 29, 2003, and a telephonic closing argument on February 26, 2003; she filed her Report and Recommendation on March 21, 2003 (Doc. 470). The defendant filed objections to the Report and Recommendation on April 25, 2003 (Doc. 472).

I have conducted an independent review of the file and have considered the Magistrate Judge's Report and Recommendation and the defendant's objections thereto. Upon consideration, the Court adopts the findings of fact and conclusions of law enunciated in Magistrate Judge Jenkins' Report and Recommendation. The defendant's objections are overruled. Accordingly, the defendant's amended motion to vacate, set aside, or correct an allegedly illegal sentence (Doc. 423) is **DENIED with prejudice**.

ORDERED in Tampa, Florida, on July 2, 2003.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-14410-F

D. C. Docket No.

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

MICHAEL SARGA.

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(21 March 2003)

REPORT AND RECOMMENDATION

This cause is before the court on Michael Sarga (Sarga's) amended motion to vacate, set aside, or correct an allegedly illegal sentence and supporting memorandum of law. [2] (Doc. Nos. 423,

---

[2]This matter has been referred to the undersigned United State Magistate Judge by the District Judge for consideration and a Report and Recommendation. *See* Local Rules 6.01(b) and 6.01(c), M.D. Fla.

424).[3] Sarga is represented by retained counsel. He is serving a life sentence for conspiracy to import into the United State five kilograms or more of cocaine following entry of a guilty plea to that charge. At issue are the following claims:

A. Ineffective assistance of counsel

I. Counsel had multiple conflicts of interests, having represented the government's chief witness against Sarga, Donald Shreve (Shreve), and approximately two dozen other related individuals;

II. Counsel had a conflict of interest regarding his personal business dealings with Sarga; Sarga[s disclosure of the business dealings counsel had with Sarga and otherwise in a truthful, complete debriefing could have led to either criminal or ethical liability or both for counsel.

B. The prosecutor participated in prosecutorial misconduct when she:

(I) should have been aware of th existing conflicts of counsel and disclosed certain information to counsel anyway, and

(II) debriefed Sarga without counsel present.

C. Counsel rendered ineffective assistance of counsel at the guilty plea and sentencing proceedings.

D. Appellate counsel was ineffective for failing to raise any

---

[3]Sarga filed Exhibits A-T in support of his amended motion to vacate.

of the above on direct appeal.

E. Trial counsel was ineffective when he permitted Sarga to believe that he could be debriefed even though (a) the terms of the cooperation agreement were not finalized and (b) Sarga was given to understand that certain guarantees about his cooperation had been given; (c) counsel gave incorrect advice to Sarga such that Sarga did not enter an intelligent plea; (d) counsel failed to secure the presence of Sarga at a hearing regarding Sarga's motion to enforce the plea agreement and to call Sarga as a witness; (e) counsel rendered ineffective assistance of counsel at the guilty plea and sentencing proceedings based on counsel's failure to fully advise Sarga regarding the pitfalls surrounding the potential cooperation with the Government during the plea and sentencing proceedings. That is, Sarga alleges that he relied on counsels advice that he would receive a lower sentence than he expected because he cooperated with the Government.

On January 28 and 29, 2003, the undersigned United States Magistrate Judge conducted an evidentiary hearing at which Sarga and the Government presented witnesses, documentary evidence, and argument in support of their respective positions. Telephonic closing arguments were held February 26, 2003.

Based on the preponderance of credible evidence introduced at the evidentiary hearing and on a review of the entire record, it is recommended that the motion to vacate, set aside, or correct an allegedly illegal sentence be denied.

Procedural History[4]

1. On January 21, 1992, Marvin Clay James and Sarga were charged in a criminal complaint with three counts: (1) conspiring to import into the United States five kilograms or more of a mixture or substance containing a detectable amount of cocaine, contrary to the provisions of Title 21, United States Code, Section 952(a), all in violation of Title 21, United States Code, Sections 960(b)(1)(B)(ii) and 963; (2) importing into the United States five kilograms or more of a mixture or substance containing a detectable amount of cocaine, in violation of Title 21, United States Code Section 952(a) and 960(b)(1)(B)(ii) and Title 18, United States Code, Section 2; (3) conspiring to possess with intent to distribute five kilograms or more of a mixture or substance containing a detectable amount of cocaine, contrary to the provisions of Title 21, United States Code, Section 841(a)(1), in violation of Title 21, United States Code, Section 841(b)(1)(A)(ii)(II) and 846. (Doc. No. 1) The time frame of the conspiracy was from in or about March 1990, through in or about

[4] The procedural history sets forth the historical facts of the case and are findings of fact pursuant to Rule 52(a), Fed. R. Civ. P.

October 1991. Attached to the complaint was the affidavit of Customs Agent Don William Dunn(Dunn).

2. Sarga was represented by Attorney Arnold Levine (Levine) throughout the proceedings in District Court.

3. On January 27, 1992, Magistrate Judge Wilson determined that Sarga should be detained without bail and committed him to the custody of the Attorney General for confinement. (Doc. No. 7)

4. Beginning on January 27, 1992, a series of letters and documents were exchanged between Levine and Assistant United States Attorney (AUSA) Roberta Bahnsen (Bahnsen).[5] In the first letter, dated January 27, 1992, Bahnsen enclosed a proffer agreement and a waiver of speedy trial. Bahnsen stated that "debriefing will entail a full and complete disclosure of all of Mr. Sarga's narcotics

---

[5]Copies of the letters exchanged between Bansen and Levine prior to the hearing on the motion to enforce the plea agreement are attached as exhibits to Doc. No. 49. The letters were referenced in the District Judge's order denying Sarga's motion to enforce plea agreement. See infra. Bahnsen's letter of June 8, 1992, withdrawing the Government's willingness to negotiate a plea was sent to Levine after the District Judge denied the motion to enforce the plea agreement. A copy of the letter is found in Government's Exhibit 3, entered at the Evidentiary Hearing. In addition, the Government included copies of all of the letters in its Exhibit 3.

activities at any time, not merely his involvement with John Miro."[6] She also stated that Special Agent Dunn "has independent information which he will use to gauge Mr. Sarga's truthfulness." Bahnsen requested that the proffer agreement be returned that week. She also requested that the "debriefing take place without the benefit of counsel due to the sensitive nature of the ongoing investigations." She stated, "Counsel though may be present in the initial discussion to remind Mr. Sarga of the protection afforded him in the debriefing."

5. On January 29, 1992, Sarga agreed to a 30-day extension of time for presenting the matter for indictment pursuant to 18 U.S.C. 3161, et. Seq. And to waiver of speedy trial.

6. The Government, in an undated agreement, signed by both Sarga and Levine, stated that should any prosecution be brought against Sarga, except in a prosecution for perjury, subornation of perjury, false statements or declarations or obstruction of justice, the

---

[6] In his affidavit in support of the complaint, Dunn stated that "Victor Alderman advised your affiant that in or about March of 1990, Michel Sarga, Marvin Clay James, Donald Shreve, Victor Alderman, John Miro and others . . . did enter into a conspiracy to smuggle approximately 400 kilograms of cocaine into the United States." (See footnote 4)

Government would not offer in evidence on its direct case any statements Sarga made at the debriefing. The Agreement further stated:

> (a) the Government may use information derived from the meetings directly or indirectly for the purpose of obtaining leads to other evidence, which evidence may be used by the Government against Client in any prosecution of Client by the Government; (b) the Government may use Client's statements and all evidence obtained directly or indirectly therefrom for the purpose of cross-examination, should Client testify or for the purpose of a rebuttal case against Client.

7. Also on January 29, 1992, Levine faxed a letter to AUSA Bahnsen stating that Sarga was willing to fully cooperate with the Government in connection with the incident for which he was presently incarcerated. Levine stated that Sarga was not willing to make any statement regarding any other narcotics activities in which Sarga may have engaged before the present incident. Levine also stated that Sarga was not willing to make statements regarding a family member. Levine stated:

> The bottom line is that Mr. Sarga is available immediately to cooperate with the Government in connection with the matter herein above set out, and it's my understanding that if the Government elects to go forward based upon the foregoing, and finds Mr. Sarga has been

truthful, made a complete disclosure, and is fully cooperative, that in accordance with the office policy of the Government, the Government would agree to a four level reduction in his sentencing guidelines when he appears for sentencing after he pleads guilty.[7]

8. On January 29, 1992, AUSA Bahnsen faxed a letter to Levine formally declining Sarga's offer of qualified cooperation "in the regard that he will not disclose information concerning his narcotics activities three years ago involving Christian Hann."[8] Bahnsen also informed Levine that the Government had independent information of Sarga's narcotics activities other than the incident three years prior.

9. On January 30, 1992, Levine, by faxed letter, informed AUSA Bahnsen that Sarga was not willing to fully and completely debrief in connection with any narcotics activities other than that of John Miro's involvement in the matter for which Sarga was presently incarcerated. Levine also stated that Sarga would testify against any other participant in that matter.

---

[7] The 4-level reduction was for substantial assistance.

[8] Hann, Sarga's brother-in-law, is married to Sarga's sister. (Doc. No. 391, p. 130)

10. Levine's position was "the full and complete cooperation that Mr. Sarga is offering, except for protection for a family member, is not inconsistent with that which has been agreed to by the United States Attorney's Office in the past . . ." Levine stated that he had advised Sarga that the Government claimed that it had independent information that he was engaged in narcotic activities other than an incident that happened three years prior and that Sarga insisted that that was not true and would take a polygraph examination relative to the allegation.

11. On February 13, 1992, Bahnsen sent Levine a letter stating that Sarga's request "That no member of his family would be charged with any narcotics activities that Mr. Sarga discussed with the federal agents, nor would their property be seized for any participation in narcotics activities," was too broad to meet approval by the United States Attorney's Office.[9] Bahnsen requested that Levine proffer in a letter the information Sarga wanted to have protected, including the name(s) of the family member(s) whom he wished to have protected; the criminal activities that he wished to

[9]Bahnsen stated that she had discussed the matter with her supervisor.

have protected; the date of that criminal activity; and the federal district that this specified activity may affect.

Bahnsen stated that "there are no promises or agreements of any kind which the government is making at this time."

12. On February 13, 1992, Levine sent Bahnsen a letter asking what protection Sarga would have in regard to the information that is proffered at Sarga's debriefing.

13. On February 21, 1992, Bahnsen wrote Levine reminding him that her office was awaiting a response to her two previous letters regarding Sarga's cooperation. She requested that Levine reply so that a resolution could be made as to Sarga's cooperation before the 60-day period expired to have this matter presented to the grand jury.

14. On March 4, 1992, Bahnsen wrote Levine that the 30-day waiver of speedy trial was due to expire so that it would become necessary to present an indictment to the grand jury on Wednesday March 18, 1992. She cautioned Levine that if he wished to continue pre-indictment plea negotiations with the Government, he should return the second waiver of speedy trial not later than Wednesday,

March 11, 1992.

She also advised Levine that the United States Attorney's office in Atlanta was reviewing Customs reports concerning dynamite and machine guns without serial numbers seized from Sarga's warehouse in Atlanta pursuant to a search warrant.

15. On March 10, 1992, Levine reiterated that Sarga would cooperate in connection with the charges pending against him in the Middle District of Florida, but would not voluntarily cooperate in connection with any other criminal matters. Levine stated that since the North Carolina Indictment represented a companion case to the one for which Sarga was presently incarcerated, Sarga would cooperate in connection with that case.[10]

16. On March 11, 1992, Bahnsen sent Levine a letter stating that Dunn would be meeting with Sarga "one day this week to debrief him." She also stated that she had scheduled Sarga to testify before the grand jury on Wednesday, March 18, 1992, since Sarga was agreeing to cooperate with the instant conspiracy.

---

[10] The North Carolina indictment involved a cocaine charge against Donald Shreve.

She cautioned Levine that if he wanted Sarga to plead to an Information and waive indictment, Levine should promptly provide her with an executed second waiver of speedy trial.

17. In a letter of March 12, 1992, Bahnsen stated that because of Sarga's limitation relative to the debriefing, the United States Attorney "is not obligated to recommend a downward departure for substantial assistance." She cautioned that "the policy of the United States Attorney's Office is that cooperation which would qualify as substantial assistance for a § 5K1.1 departure must be 100% complete and truthful cooperation which includes a full disclosure of all of the defendant's criminal activities."

18. On March 13, 1992, Levine faxed Bahnsen a letter from California contending that Bahnsen's position was inconsistent with the offer made at the conclusion of the preliminary hearing. Levine alleged that Bahnsen had asked for Sarga's cooperation and willingness to testify against Miro since Bahnsen did not have sufficient evidence to prosecute Miro, in exchange for a four-level reduction in sentence. Levine stated that he would discuss the issue with Sarga when Levine returned to his office.

19. On March 13, 1992, Sarga was debriefed by AUSA Bahnsen and Special Agent Dunn outside the presence of Levine.

20. On March 18, 1992, Levine submitted a second waiver of speedy trial.

21. On March 20, 1992, Bahnsen advised Levine that, from her initial correspondence, Levine was made fully aware of the office policy regarding full and complete cooperation and that the offer of qualified cooperation was inconsistent with office policy. Bahnsen advised Levine that Sarga was debriefed on March 13, 1992.

22. On March 20, 1992, Levine faxed AUSA Bahnsen a letter stating that Sarga was told that his cooperation at the debriefing would not aid Sarga at sentencing because Sarga did not cooperate fully. Levine contended that, in his view, there was a binding agreement for a four-level departure recommendation by the Government.

23. On March 23, 1992, Levine sent Bahnsen a letter objecting to the debriefing and questioning why the debriefing occurred when there was a question regarding the scope of Sarga's required cooperation. Levine advised, that "if we can't work out the

plea and sentencing" he might seek specific performance of the agreement in his March 10, 1992, letter.

24. On March 31, 1992, Bahnsen send Levine a letter that stated, in part:

> There has been no agreement between Mr. Sarga and the government for substantial assistance which would permit Mr. Sarga to provide less than full cooperation.
>
> I wish to clarify a few points concerning Mr. Sarga's debriefing. First, Mr. Sarga was not completely truthful in his information about the instant conspiracy. For that reason alone, he could not be used as a witness for the government. Second, Mr. Sarga failed to provide any information about other narcotics activities which he has been involved in during the past five years. When he was questioned about this, he laughed. Third, Mr. Sarga failed to provide information of Mr. Shreve's and Mr. Miro's narcotics activities during the past five years. When he was questioned about this, he laughed and said they were good people. Fourth, Mr. Sarga provided absolutely no information concerning the location of any of his assets. When he was questioned about this, he laughed and specifically stated that he did not wish to provide any information concerning the identification of his assets. Fifth, Mr. Sarga was not questioned about the circumstances of the North Carolina indictment nor did he volunteer any information in that regard.
>
> Based upon this debriefing, which was of little to no value, Mr. Sarga has not met the requirements of this office's policy of full and complete cooperation to qualify for substantial assistance.

25. However, on April 6, 1992, Bahnsen sent Levine a

follow-up letter offering Sarga an opportunity to provide full and complete cooperation consistent with the policy of the United States Attorney's Office.

26. On April 8, 1992, an Indictment was returned charging Sarga and Donald Shreve with four counts: (1) conspiring to import into the United States five kilograms or more of a mixture or substance containing a detectable amount of cocaine, in violation of Title 21, United States Code Sections 960(b)(1)(B)(ii) and 963; (2) aiding and abetting in knowingly and intentionally importing into the United States five kilograms or more of a mixture or substance containing a detectable amount of cocaine, in violation of Title 21, United States Code Sections 952(a) and 960(b)(1)(B)(ii), and Title 18 United States Code, Section 2; (3) conspiring, from in or about March 1990 through in or about October 1991, to possess with intent to distribute five kilograms or more of a substance containing a detectable amount of cocaine, contrary to the provisions of Title 21, United States Code, Section 841(a)(1), in violation of Title 21, United States Code, Section 841(b); (4) on or about September 23, 1991, knowingly and intentionally possessing with intent to

distribute five kilograms or more of a mixture or substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, 841 (b)(1)(A)(ii)(II) and 846 and Title 18, United States Code, Section 2, plus forfeitures. (Doc. No. 14)

27. On April 15, 1992, Sarga entered a plea of not guilty before the undersigned United States Magistrate Judge. Sarga was represented by Levine. (Doc. No. 20)

Motion To Enforce Plea Agreement

28. On May 5, 1992, Levine filed a motion to enforce the plea agreement contending that Sarga had entered into a plea agreement for a downward departure.[11] (Doc. No. 49)

29. On May 12, 1992, Bahnsen wrote Levine stating that she was in receipt of his motion to enforce the plea agreement. She stated that the Government would honor any agreement for substantial assistance if Sarga fully cooperated about all of his past criminal activities and activities of others. She asked Levine to "revisit with him his opportunity for a downward departure if he

---

[11] On May 28, 1992, Levine filed a supplemental memorandum of law in support of the motion to enforce the plea agreement. (Doc. No. 77)

were to fully cooperate." (Doc. No. 49, Composite Exhibit N, letter dated May 12, 1992, from Bahnsen to Levine)

30. On May 27, 1992, a First Superseding Indictment that added James Dreby as a Defendant was returned in Tampa. (Doc. No. 74)

31. On May 29, 1992, the Honorable William J. Castagna held a hearing on the May 5, 1992, motion to enforce plea agreement. (Transcript at Doc. No. 388) After considering oral argument from the parties, the Court subsequently denied relief, finding that "no formal written plea agreement was executed." (Doc. No. 85)

Judge Castagna held that an examination of the letters between AUSA Bahnsen and Attorney Levine showed that the AUSA consistently maintained the position that no motion for downward departure would be made absent full disclosure. Likewise, Sarga consistently maintained the position that the would not divulge information on all his prior criminal activities. The District Judge stated that the letters and the arguments made by defense counsel at the hearing left the Court with the firm conviction that there was never a meeting of the minds on the essential elements

of the plea agreement; hence there was not contract.[12]

32. On June 8, 1992, the Government withdrew its plea offer. (Bahnsen's June 8, 1992, letter to Levine; see footnote 4)

33. On July 8, 1992, Sarga, Donald Shreve, James Dreby, and John Miro were charged in a Second Superseding Indictment with four counts: (1) conspiring, from in or about March 1990, through in or about October 1991, to import into the United States five kilograms or more of a mixture or substance containing a detectable amount of cocaine, in violation of Title 21, United States Code Sections 960(b)(1)(B)(ii) and 963[13]; (2) aiding and abetting in knowingly and intentionally importing into the United States five kilograms or more of a mixture or substance containing a detectable amount of cocaine, in violation of Title 21, United States Code Sections 952(a) and 960(b)(1)(B)(ii), and Title 18 United States

---

[12] The District Judge noted that even if there had been a plea agreement, Sarga would still not be entitled to specific performance because he had not demonstrated that he had fully performed his part of the agreement, a determination that is normally at the sole discretion of the Government. The District Judge also stated that Sarga had not proven that specific performance was the appropriate remedy for the alleged breach.

[13] The amount of cocaine involved was approximately 400 kilograms (See Doc. No. 200 at 30)

Code, Section 2; (3) conspiring, from in or about March 1990 through in or about October 1991, to possess with intent to distribute five kilograms or more of a substance containing a detectable amount of cocaine, contrary to the provisions of Title 21, United States Code, Section 841(a)(1), in violation of Title 21, United States Code, Section 841(b); (4) on or about September 23, 1991, knowingly and intentionally possessing with intent to distribute five kilograms or more of a mixture or substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, 841(b)(1)(A)(ii)(II) and 846 and Title 18, United States Code, Section 2, plus forfeitures. (Doc. No. 131)

Guilty Plea Hearing

34. On September 17, 1992, a guilty plea hearing[14] was held before the undersigned United States Magistrate Judge pursuant to Rule 11, Fed.R.Crim.P. and Local Rules 6.01(b) and 6.01(c), M. D.

---

[14]There was no written plea agreement in this case. (Doc. No. 2002, p.3) However, in exchange for Sarga's pleading guilty to Count One, the conspiracy to import cocaine charge, the Government agreed, at the time of sentencing, to dismiss the remaining charges against Sarga. In addition, the Government agreed that Sarga's estranged wife, Susan Bloom, would be given an opportunity to appear before the Court in connection with any forfeiture proceedings to adjudicate her rights and interest in a property known as Butlerhouse. (Doc. No. 200, p. 10) Otherwise, the plea was an open plea.

Fla. (Doc. No. 200) Sarga pled guilty to the charge of conspiracy to import the United States five kilograms or more of a mixture or substance containing a detectable amount of cocaine in violation of Title 21, United States Code Sections 960(b)(1)(B)(ii) and 963.

35. At the plea hearing, Sarga stated that he was fully satisfied with the advice and representation Levine had provided him. (Doc. No. 200, p. 9)

36. At the hearing, Sarga was fully advised of the consequences of his guilty plea, including the maximum penalty of a life sentence.[15] (Doc. No. 200; see especially pp. 16-17, 19)

37. The Magistrate Judge specifically asked Sarga:

> Now, do you understand that if the sentence is more sever than you subjectively might expect and your attorney might have expected, that you will be bound by your plea and would not have a right to withdraw your plea simply because you miscalculated?

(Doc. No. 200, p. 24) Sarga answered, "Yes, ma'am." (Doc. No. 200, p. 25)

38. Sarga was clearly told that the maximum sentence was

---

[15] Sarga was born November 24, 1943; he was 49 years old at the time of the plea and sentencing hearings. See PSI, Identifying Data Section, page 1.

life without parole. (Doc. No. 200, p.19)

39. Levine stated that there was no agreements as to the appropriate sentence, but that the cooperation issue, the role issue, and other issues would be discussed at the time the presentence report was prepared, and/or at the time of sentencing. Levine also stated:

> Those things that are normally a part of the Sentencing Guidelines issues; but aside from that, I've had no discussions with Ms. Bahnsen or my client about that subject matter. We are just pleading open, open plea to be resolved by the Court at the time of sentencing based upon whatever guidelines are applicable and/or challenged, depending upon the relevant position that my client is ascribed to by the Probation Officer.

(Doc. No. 200, pp. 20-21)

40. However, Levine stated that he had advised Sarga that the minimum mandatory penalty for the conspiracy charge in count one was ten years' imprisonment and the mandatory penalty was life imprisonment. (Doc. No. 200, p. 14)

41. At the guilty plea hearing, when the Court asked Sarga whether Levine had "talked about the Sentencing Commission Guidelines and how they might apply to your case," Sarga answered,

"A little bit." (Doc. No. 200, p. 23) When the Court asked Sarga whether he had discussed the guidelines issues with Levine "enough so that you are prepared to enter your plea today," Sarga answered, "Yes, ma'am." (Doc. NO. 2022, p.23)

42. At the hearing, the Government stated the factual basis for the guilty plea:

> MS. BAHNSEN: Your Honor, I'm drawing the factual - - many of the facts from the affidavit to the criminal complaint that was filed against Mr. Sarga back in January. It provides in that affidavit that Victor Alderman, who was arrested in October of - - or November, rather, of '91, has advised that Michael Sarga, Marvin Clay James, Donald Shreve, John Miro and others had entered into a conspiracy beginning in about March of '90 to smuggle approximately 400 kilograms of cocaine into the United States.
>
> Mr. Sarga's contribution to that conspiracy is that he purchased the sailing vessel which was used, that is, the YANKEE PEDDLER. There was substantial work that was done on this vessel prior to the vessel sailing. Mr. Sarga furnished the money towards materials that were needed to repair the boat and get it in sailing condition.
>
> Mr. Sarga also furnished money towards the expenses of Victor Alderman and Marvin Clay James, that is, food expenses, and contributed towards their housing.
>
> It was between March and June of 1990 that Mr. Sarga had several meetings with the other co-conspirators in this conspiracy, that is, Marvin Clay James, Victor Alderman, John Miro and Donald Shreve. Many of these

meetings too place at the Butlerhouse in Pinellas County. These meetings took place for the purpose of discussing arrangements about the trip, when the trip was to take place and where they were to go.

It was not until June 18th that the vessel actually sailed to Central America. The original intention was the trip was to take a couple of weeks, but the trip actually ended up taking approximately three months.

During the time that the vessel was gone, Victor Alderman and Marvin Clay James who were sailing the vessel had telephone communications with Michael Sarga both at the Butlerhouse in Pinellas County and at a house in Atlanta - - actually, it was in Marietta, Georgia. This was a house that Mr. Sarga was renting.

The telephone calls involved discussions about coordinating - - getting food and money to Marvin Clay James and Victor Alderman, discussions about when the cocaine was actually to be delivered to the boat.

During this trip that Alderman and James were on the vessel, Donald Shreve flew in to meet with them to provide them with money; and then, finally, a meeting took place just off the coast of Nicaragua where Colombians did, in fact, deliver 400 kilograms of cocaine to Victor Alderman and Marvin Clay James.

Subsequent to receiving the cocaine, James and Alderman sailed the vessel back to Pinellas County. They stored the cocaine in storage units and then met with Michael Sarga, John Miro and Donald Shreve at the Tahitian Inn on Dale Mabry Highway in Tampa. This occurred, I believe, on or about September 21st or 23rd - - September 21st.

THE COURT: Of '90?

MS. BAHNSEN: Of '90 was when the cocaine was actually brought into the United States. It was on September 23rd - - on or about September 23rd that they had the meetings at the Tahitian Inn. And the meetings were basically about arranging for their receipt of the cocaine and Mr. Alderman's and Mr. James' payment by Mr. Miro.

As to evidence of the substance being cocaine, it was in January of '91 that Donald Shreve was arrested in North Carolina with one kilogram of cocaine that he was selling to an undercover agent. That kilogram had individual markings on it of the initials J.A.P. Mr. Shreve in undercover conversations to law enforcement advised that it was from a load that was brought into the United States during the summer of 1990.

In November of '91, Victor Alderman was arrested. He had one kilogram in his possession with the initials J.A.P.; he also provided additional kilograms to law enforcement. I believe there were four additional kilograms; they also had the markings of J.A.P. Victor Alderman indicated that these kilograms were from the load that he and Marvin Clay James sailed into the United States pursuant to their agreement with the other co-conspirators.

The substances from the North Carolina investigation involving Mr. Shreve, that one kilogram was submitted for testing, as well as the total of five kilograms that Victor Alderman turned over, which all of them had the initials J.A.P. as markings. They all tested positive for cocaine hydrochloride.

But the cooperation of Marvin Clay James has also provided corroboration to Victor Alderman's statements, that is, that the agreement to import the cocaine involved an agreement to import approximately 400 kilograms of

cocaine. I believe there are numerous other facts to 3 corroborate this, but that's essentially the sum and substance of Mr. Sarga's involvement in this conspiracy.

...

MS. BAHNSEN: If I may just add, Your Honor, that the Government in no way is representing these as the complete facts for purposes of the Presentence Report, that there are numerous additional facts that would establish Mr. Sarga's role in these events; so there is no misunderstanding here that somehow the Government is going to later be held to these facts as all of the facts that would be attributed to Mr. Sarga's involvement in this conspiracy because these are not the complete set of facts.

I'm only offering these up as facts sufficient for a Rule 11 plea; but the Government fully intends to provide additional facts in support of its - whatever argument it's going to make concerning Mr. Sarga's role in these events . . .

(Doc. No. 200, pp. 30-35)

43. Sarga did not object to any of the factual bases for the plea. In fact, he answered, "Yes," when the Magistrate Judge asked if all of the facts were true. (Doc. No. 200, p. 35)

Sentencing Hearing

44. On December 29 and 30, 1992, the Honorable Steven D. Merryday acknowledged the guilty plea and held sentencing proceedings. The sentencing hearing was protracted and was

continued until April 1993.[16]

45. At the December 29, 1992, sentencing hearing, Sarga faced a sentence based on an offense level of 39 computed with a base offense level of 38, plus a 3-level adjustment for his role in the offense, minus a 2-level adjustment for acceptance of responsibility. The statutory penalty was a mandatory term of imprisonment from 10 years to life imprisonment. 21 U.S.C. §§ 963 and 960(b)(1). The maximum fine was $4 million. (See PSI at Doc. No. 298, Attachment A)[17]

---

[16] The sentencing hearing transcript appears in several volumes:

1. Document Number 256, dated December 29, 1992, is the first volume.
2. Document Number 257, dated December 30, 1992, is the second volume.
3. Document Number 391, dated December 30, 1992, is the third volume.
4. Document Number 345, dated April 28, 1993, is the fourth volume.
5. Document Number 302, dated April 28, 1993, is the fifth volume.

[17] On December 3, 1992, Levine mailed a letter to Probation Officer Lisa Lam objecting to paragraph 23 and paragraph 31 of the PSI. (Doc. No. 298, Addendum to PSI and Attachment B). Levine alleged that the allegations listed in paragraph 23 overstated the amount of money and breadth of the alleged criminal activities in which Sarga participated and he alleged that Sarga should not receive a 3-level increase for his role in the offense since he did not exercise any measure of control over the decision-making or planning for the criminal group. In response, the Government stated that it would refute the objections.

On December 28, 1992, a Supplemental Addendum to the PSI was filed. Probation Officer Lisa Lamb stated that the Government had submitted an objection, on December 23, 1992, to Levine's letter regarding the 3-level increase for Sarga's role in the offense. Furthermore, the Government objected to Sarga's receiving two points for acceptance of responsibility.

46. At the December 29, 1992, hearing, Levine called Sarga as a witness to contest the finding that he was a supervisor or organizer.[18] (Doc. No. 256, beginning at p. 9)

47. Over Levine's repeated objections, the Court allowed AUSA Bahnsen to cross-examine Sarga about other issues, including Sarga's assets.[19] (Doc. No. 256, beginning at p. 20)

48. Levine asked the Court to take judicial notice that co-defendant Alderman was sentenced to 264 months and co-defendant Jones was sentenced to 188 months. (Doc. No. 257, pp. 79-80)

49. At the conclusion of the December 30, 1992, sentencing hearing, the District Judge requested a transcript of the sentencing hearing and postponed Sarga's sentencing until the Court had an opportunity to review the transcripts.

---

[18] Sarga felt that the PSI recommendation for a three-level enhancement for his role in the offense was incorrect, and, in an effort to persuade the Court that the enhancement was wrong elected to testify.

[19] At the debriefing, Sarga had refused to provide any information as to his assets, previous criminal history, or family members. (Doc. No. 256, p. 11, 23, 27, 34) Subsequently, Sarga stated that he had not been truthful about his assets when questioned by the Probation officer. (Doc. No. 256, pp. Doc. No. 257 pp. 24, 25)

Bahnsen cross-examined Sarga about his comments at the debriefing as to his role in the current conspiracy. She also cross-examined him relative to information Dunn had acquired from co-defendants, especially Donald Shreve. (See Doc. No. 391, beginning at p. 9)

50. On January 21, 1993, the Government filed a motion for extension of time to file a supplemental sentencing memorandum based on the Court's December 30, 1992, permission to submit any additional issues relative to sentencing. The motion was based on Sarga's testimony at the December 29, 1992, hearing and a subsequent search warrant that was executed on the property of Sarga's sister and brother-in-law in Morgan City, Louisiana, on or about January 21, 1993. (Doc. No. 253, p. 1 ¶ 4) The Government's position was that the preliminary results of the warrant revealed new evidence about Sarga's assets related to his testimony at the December 29, 1992, sentencing hearing (Do. No. 253)

51. On January 27, 1993, the Government filed a second motion for extension of time based on the Court reporter's need for additional time to provide the sentencing transcript. (Doc. No. 254)

52. Sarga filed an objection to the motions for extension of time. (Doc. No. 255) On February 12, 1993, the Court construed Sarga's objection as a motion to withdraw Sarga's guilty plea and denied the motion as premature. (Doc. No. 259)

53. On March 4, 1993, the Government filed its

"Memorandum To Supplement the Presentence Report." (Doc. No. 267) The Government alleged that, based on his testimony at the sentencing hearing, Sarga was untruthful about his assets, and the Government included a list of assets that had been located subsequently pursuant to a search warrant. (Doc. No. 267) The Government also set forth, in detail, Sarga's untruthful testimony at the sentencing hearing.

54. On April 19, 1993, the Government filed a request for a 2-level enhancement pursuant to USSG § 3C1.1, Obstructing or Impeding the Administration of Justice. (Doc. No. 281) The Government stated that the request was based on the specific examples of Sarga's materially false statements to the Court on December 29 and 30, 1992. In paragraph 4 of the motion the Government referenced the letter Sarga wrote to his brother-in-law, on September 6, 1992, regarding Sarga's assets in which Sarga stated that he was willing to spend more time in prison than to give up his assets. (Do. No. 281, p. 2)

55. At the end of April 28, 1993, sentencing hearing, Agent Dunn testified that the Government did not have probable cause to

execute a search warrant until after Sarga's testimony at the December 1992 sentencing hearing. (Doc. No. 345), pp. 21, 37) When the search warrant was executed, the Government discovered that Sarga had assets that Sarga had held in an open title and that he had transformed to his brother-in-law and/or hidden. Letters discovered in the execution of the warrant outlined Sarga's plan to dispose of or to hide the assets. (Doc. No. 267, Attachment A)

56. On April 28, 1993, the Court conducted the final sentencing proceedings and

sentenced Sarga to life imprisonment. (Transcript at Doc. No. 302) The Court, prior to imposing sentence, afforded the parties an opportunity to present argument on various issues. Levine argued that Sarga should not be enhanced for his role in the conspiracy; that the Court should not allow the additional evidence; and that Sarga should not receive a 2-point adjustment for obstruction of justice.[20] The Court stated:

I did not believe Mr. Sarga's testimony when I heard it on the 29th and the 30th, for the most part . . . my own conclusion upon

[20] In regard to the latter, the Government cited United States v. Dunnigan, 507 U.S. 87 (1993) (perjurious testimony may be the basis for an obstruction of justice sentence enhancement).

observing Mr. Sarga in court was that he was untruthful, smug, and calculating, and not worthy of belief, both as to his role in the offense, to the extent that that differed from the testimony of Agent Dunn, and as to the existence and location of his assets.

With respect to the acceptance of responsibility issue and with respect to the issue of obstruction, the latter first, 3C1.1 prescribes that if a defendant willfully obstructed or impeded or attempted to obstruct or impede the administration of justice during the investigation, prosecution or sentencing of the instant offense, increase the offense level by two levels, period, end quote. I find that the defendant is guilty of willfully impeding sentencing consistent with at least application notes 3 D and F, perhaps E, and perhaps even B.

With respect to those considerations set out with respect to acceptance of responsibility, I not the application notes refer to the fact in 1A that a defendant of course may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to retain a reduction under this subsection. Nothing in my ruling is inconsistent with that, and I explicitly acknowledge and accept that premise.

Note five says the sentencing judge is in a unique position to evaluate the defendant's acceptance of responsibility. For this reason the determination of the sentencing judge is entitled to great deference on review. With respect to the first sentence I so find that because of my opportunity to observe the demeanor of the witness and to hear and evaluate the substance of the testimony, that I find his testimony and its content and its delivery to be positively inconsistent with the notion that he has accepted responsibility for these offenses within the meaning of that term as it is used to express an underlying objective of the Sentencing Commission in promulgating the guidelines.

That being the case, the result is an offense level - - a criminal history category of one and an offense level of 43, which

results in a guideline sentence of life.

Therefore, pursuant to the Sentencing Reform Act of 1984, it's the judgment of the court that the defendant Michael Sarga is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of life. The defendant is fined one million dollars and assessed a $50 special assessment.

(Doc. No. 302, pp. 4-6)

Motion To Withdraw Guilty Plea/Notice of Appeal of Sentence

57. On May 7, 1993, Sarga filed a motion to withdraw his plea of guilty (Doc. No. 298), a notice of appeal from the order sentencing Sarga to life imprisonment and imposing the $1,000,000 fine. (Doc. No. 300)

58. The Government responded and, on March 8, 1994, the Court allowed Sarga to file a supplemental memorandum to which the Government could respond. (Doc. NO. 339)

59. On March 10, 1994, Sarga filed a supplemental request for oral argument on the motion to withdraw the guilty plea on the grounds that the plea was not "freely and voluntarily made based on (1) the court's denial of Sarga's initial motion to withdraw his guilty plea as premature; and, (2) the admission of the newly discovered

evidence at the April [sentencing] hearing, over Sarga's objection and without Sarga's having an opportunity to impeach, examine, rebut or attack the evidence." (Doc. No. 341)

60. On March 28, 1994, the Government filed its response. (Doc. No. 344)

61. On August 8, 1994, the District Judge held a hearing on the motion to withdraw the guilty plea. (Doc. No. 360)

62. On August 25, 1994, the Court denied Sarga's motion to withdraw his guilty plea. (Doc. No. 361) The Court found that Sarga had close assistance of counsel and that the Magistrate Judge complied fully with Rule 11 at the re-arraignment. The Court held that if a defendant received close and adequate assistance of counsel and entered a plea knowingly and voluntarily, the defendant's subsequent dissatisfaction with the severity of the sentence imposed was not a sufficient ground for withdrawal of the plea. The Court also held that, even if the sentencing issues Sarga raised were properly before the Court, the Court would not be inclined to grant the motion to withdraw because the Court did not find that Sarga was unfairly prejudiced at sentencing.

Notice of Appeal from Denial of Motion to Withdraw Guilty Plea

63. On September 2, 1994, Sarga filed a notice of appeal from the final order denying Sarga's motion to withdraw his guilty plea. (Doc. No. 363)

Levine's Motion to Withdraw

64. On January 26, 1995, Levine filed a motion to withdraw as Sarga's counsel. (Doc. No.371)

65. The District Judge referred the motion to withdraw to the undersigned Magistrate Judge who deferred ruling on the motion, pending receipt of information to be filed, in camera, by Levine, relevant to financial arrangements between Levine and Sarga, pursuant to Addendum Four, Eleventh Circuit Plan Under the Criminal Justice Act, §(d)(2), Eleventh Circuit Rules. (Doc. No. 372)

66. On February 6, 1995, Levine filed an affidavit in camera, stating that he represented Sarga *pro bono* and that neither he nor his law firm had directly or indirectly received any monies or things of value from Sarga, or on his behalf, for representing Sarga in this case. (Sealed Doc. 38; Unsealed Affidavit at Doc. No. 436)

67. On March 29, 1995, the District Judge adopted the Magistrate Judge's recommendation and granted Levine's motion to withdrawal as counsel. Pursuant to a notice of appearance (Doc. No. 374) filed March 23, 1995, Bradley R. Stark was substituted as counsel on behalf of Michael Sarga. (Doc. No. 376)

Opinion of the United States Court of Appeals for the Eleventh Circuit

68. The Eleventh Circuit consolidated the appeals and, in an order dated April 25, 1997, affirmed, stating:

> In these consolidated appeals, Michael Sarga contends that district court: (1) erred in failing to accept his plea of guilty to conspiracy to import in excess of five kilograms of cocaine prior to the imposition of sentence; (2) abused its discretion in denying his motion to withdraw his guilty plea; (3_ prejudiced appellant's case in its sentencing phase by delaying the sentencing hearing; (4) abused its discretion in considering evidence discovered by the Government in the process, and as a result, of executing a search warrant during a recess in appellant's sentencing proceeding; and (5) erred in finding that appellant played a managerial role in the offense, obstructed justice by giving false testimony during the sentencing proceeding, and failed to accept responsibility for his criminal conduct.
>
> Appellant did not present his first and third claims to the district court. We therefore examine these claims for plain error. We find none. As for appellant's remaining claims, we conclude that the district court's findings of fact on these issues are well grounded in the record; the claims therefore fail.

Appellant's sentence is accordingly AFFIRMED.

United States v. Sarga, 113 F.3d 1249 (11th Cir.) (Table), *cert. denied*, 522 U.S. 984 (1997), *reh'g denied*, 522 U.S. 1070 (1998). (Doc. No. 395) The mandate issued May 28, 1997.

Motion to Vacate, Set Aside, or Correct an Allegedly Illegal Sentence

69. Sarga filed his original motion to vacate, set aside, or correct an allegedly illegal sentence on November 16, 1998. Upon order of the Court, he filed the amended motion to vacate and supporting memorandum of law on October 9, 2001. (Doc. Nos. 423 and 424)

70. On February 11, 2002, the Government responded to the amended motion to vacate, set aside, or correct an allegedly illegal sentence. (Doc. No. 427)

71. On April 1, 2002, the amended motion to vacate was referred to the undersigned United States Magistrate Judge for a Report and Recommendation.

72. On June 27, 2002, the Magistrate Judge held a status conference at which the parties argued the need for discovery and an

evidentiary hearing.[21]

73. On August 15, 2002, the Court allowed the parties 45 days to conduct limited discovery. The order allowed Sarga to depose defense and appellate counsel and allow4ed the Government to depose Sarga. The order also set a status conference of October 22, 2002). (Doc. No. 437)

74. On September 24, 2002, the Court granted Sarga's motion for extension of time for discovery through October 30, 2002, but encouraged that Sarga's counsel "make every effort" to conclude any depositions prior to the October 22, 2002, status conference. (Doc. No. 439).

75. On October 15, 2002, Sarga filed a motion for a 60-day extension of time to take court-permitted depositions and to reschedule the status conference or for permission for counsel for Sarga to appear telephonically. (Doc. No. 440)

76. On October 18, 2002, the Court granted the motion

[21]On that same date, the Magistrate Judge entered an order to show cause why document number 38 should not be unsealed and on July 24, 2002, the Magistrate Judge entered an order directing the Clerk to unseal document number 38 (Levine's affidavit relative to his financial arrangements with Sarga as to representation in Case No. 8:92-cv-98-T-23EAJ). The unsealed affidavit appears as document number 436.

rescheduling the status conference and the extension of time to take depositions, but denied the motion for counsel to appear telephonically at the status conference. The status conference and discovery deadline was reset for December 17, 2002. (Doc. No. 441).

77. On December 12, 2002, the parties filed a joint motion to continue the status conference (Doc. No. 442), which the Court denied. (Doc No. 443).

78. On December 17, 2002, the Court held the previously-scheduled status conference and entered an order scheduling an evidentiary hearing for January 16 and 17, 2003. (Doc. No. 444) The parties did not take any deposition discovery.

79. On December 18, 2002, the Court entered an amended order resetting the evidentiary hearing for January 28 and 29, 2003, pursuant to Sarga's motion to continue.

80. Subsequently, the parties filed motions relative to the evidentiary hearing. The Court deferred ruling on Sarga's motion to permit expert attorney testimony pending the evidentiary hearing (Doc. No. 451) and denied Sarga;'s motion to permit written closing argument.

81. As ordered by the Court, the parties filed a pre-evidentiary hearing statement in compliance with Rule 3.06(c). (Doc. No. 452) The Government filed a Memorandum and Argument Regarding Disputed Issues of Law (Doc. No. 453) and a Motion to Quash Subpoena for AUSA Roberta Bahnsen Klosiewicz (Doc. No. 454

82. At the evidentiary hearing, the Court granted Sarga[s motion for expert testimony. (*See* Doc. No. 449)

83. Sarga withdrew the subpoena for AUSA Roberta Bahnsen Klosiewicz, thereby mooting the motion to quash the subpoena . (Vol. 2, 20)[22]

84. Sarga presented his own testimony, as well as that of trial counsel Arnold Levine, appellate counsel Bradley Stark, and attorney William M. Norris in support of his motion to vacate.

85. The Government presented the testimony of Customs Agent Dunn in rebuttal.

86. The Court set telephonic closing arguments for

[22]Transcripts of the evidentiary hearing were filed as volumes 1 and 2 at Doc. Nos. 461 and 462. Volume 1 includes the proceedings on January 28, 2003, and Volume 2 includes the proceedings on January 29, 2003. Citations to the transcripts will be designated by the Volume number followed by the page number.

February 26, 2003, and ordered the parties to file citations of any additional authorities not cited in previous submissions by February 24, 2003, which the parties did.

87. Telephonic closing arguments were held February 26, 2003.[23]

Finding of Fact

1. Levine was an experienced criminal defense attorney at th the time he represented Sarga in the instant case. (Vol. 1, 150) He had been a prosecutor (Vol. 1, 177) and had been in practice for 30 years. (Vol. 1, 203) He described himself to "be a hard charger, to work hard to investigate the facts and try to make an evidentiary presentation that's helpful to my client." (Vol. 1, 185)

2. Sarga and Levine had a long-standing professional and personal relationship that dated back to 1972 when Sarga first retained Levine in connection with an IRS matter. Subsequently, Levine successfully represented Sarga in connection with several drug prosecutions. (Vol. 1, 23, 157)]

3. Levine testified that he represented multiple

[23]Counsel and Sarga were available by telephonic conference call at the closing arguments.

individuals over a period of time who were more or less interrelated in marijuana smuggling schemes. (Vol. 1, 157) It was his long-standing practice to advise "defendant's's about the possible down-sides of more than one of them being represented by one lawyer." (Vol. 1, 160)

4. Although Levine had represented Donald Shreve, Sarga's co-defendant's in the instant case, in the past, he did not represent Shreve in the instant case (Vol. 1, 104) which had no connection to the matters in which Levine had represented Shreve many years prior to the initiation of the prosecution of this case. (Vol. 1, 193) The prior Shreve representation in a 1975 marijuana case in Georgia was resolved by a bond forfeiture. (Vol. 1, 103)

5. Levine had no involvement any of Sarga's illegal activities. Levine denied ever assisting Sarga to launder money and the Court finds his testimony more credible (Vol. 1, 200)[24]

6. Sarga testified that he always paid Levine in cash and he did not receive or ask for a receipt for payments. (Vol. 1, 25-

[24]Sarga testified that Levine assisted Sarga and two associates to set up a company to "clean up money" in 1974. (Vol. 1, 93) The name of the company was Mint Graphics. (Vol. 1, 94)

26) Levine refuted this allegation and testified that it was a firm practice to issue receipts for cash or other tender, although he does not have receipts from 30 years in the past. However, due to Sarga's drug business, Levine would not have been surprised if Sarga had paid in cash. (Vol. 1, 151-52)

7. Sarga and two associates, Pedro Alvarez and Scott Mott, paid Levine a retainer of $25,000 to represent Sarga in a marijuana smuggling case in north Florida in 1973. (Vol. 1, 26, 28)

8. As of the date Sarga was charged in the instant case, he had never been convicted of any of the charges in which Levine represented him. (Vol. 1, 44)

9. During 1975 to 1984, Sarga was a fugitive in connection with a 1975 indictment in the Middle District of Florida in Case No. 75-181-T-H charging that Sarga, Pedro Alvarez, Lawton Scott Mock, Derrill Lee, Jerold Martin Massler, Paul Rice, John Lesley Wells, Jr., Pedro Davilla, and Raoul Alberto Davilla conspired to import and possess with intent to distribute marijuana in violation of 21 U.S.C. §§ 963 and 846. (Defendant's Exhibit 1 (F)

introduced at the Evidentiary Hearing)[25] On July 19, 1982, the Honorable Wm. Terrell Hodges signed an order for dismissal for Michael Sarga, Rauel Davilla, and Pedro Davilla pursuant to the Government's motion alleging that, due to their remaining at large without an arrest for seven years and the present state of witnesses and evidence that would make prosecution to a successful conclusion unlikely. (Defendant's Exhibit 1 (D)) Even though the charges were dismissed in 1982, Sarga did not return to Tampa until 1984. (Vol. 1, 35)

10. Sarga testified that he had tremendous confidence in Levine because, in Sarga's view, Levine was his "Perry Mason." Sarga stated "he had batted a thousand for me for 20--over 20 plus years. Everything that he ever did for me, he won, and it was -- I mean, he kept me out of trouble." (Vol. 1, 44)

11. Due to their relationship, and the fact that Levine had made a "lot of money" from representing Sarga and his associates in the drug business, Levine did not require a retainer or fee from Sarga for representing him in the instant case. (Vol. 1, 56,

[25]Defendant's Exhibit 1 into4duced at the evidentiary hearing contains exhibits A-T previously filed in support of the motion to vacate.

206)

12. Although Sarga testified that Levine was working off an "old debt" that Levine owed Sarga in connection with some real property deeded to Levine's firm by Sarga in 1974[26]

13. Sarga testified that he determined that, in the present case, it was in his best interest to pursue a cooperation agreement with the Government because he realized that a conspiracy charge was difficult to win at trial. (Vol. 1, 67, 112) He was also aware that Shreve had been arrested in January 1991, and had begun cooperating with the Government. (Vol. 1, 52-53)

14. Levine, with Sarga's consent, pursued a strategy of limited cooperation with the Government.[27] (Government's Exhibit 3; Vol. 1, 74) Sarga dd not want to provide any information which might implicate family members nor did he want to provide a full

[26]The old debt was related to real property in Pasco County known as "Williams Acres." Levine testified that Sarga conveyed the property in 1974 to Levine, Freedman & Hirsch, P.A. as security for legal services. (Vol. 1, 161; Defendant's Exhibit 1 (J)) Levine testified that he held the property for about three to five years after Sarga became a fugitive before selling it to satisfy Sarga's obligation for additional legal services. (Vol. 1, 162) The law firm sold the land in two parcels to Rene and Joyce DePhillips and Timothy and Regina Sue Kennedy. (Defendant's Exhibit 1 (M))

[27]Although Levine visited Sarga only two or three times in jail (as evidenced by the jail log (Defendant's Exhibit 1 (R)), Sarga spoke with Levine about hsi case by telephone at Levine's office or home. (Vol. 1, 71, 85, 86)

disclosure of assets. (Vol. 1. 91, 105, 174)

15. Levine reviewed the proffer agreement with Sarga before both of them signed it and returned it to AUSA Bahnsen. (Government's Exhibit 3; Vol. 1, 76) During the debriefing, Sarga hoped to persuade the Government of his limited role in the conspiracy. (Vol. 1, 109)

16. At the March 13, 1992, debriefing, Sarga refused to provide any information about his assets. (Vol. 1, 92)[28]

17. Levine was out of town on the day of the debriefing. He testified that it is his usual practice not to attend a proffer [debriefing] session involving a client and the Government because he does not want to be accused of "leaking" information learned during debriefing. He also knew that Sarga "was going to be making statements about people I had previously represented" so he did not want to be present. (Vol. 1, 176-77)

18. Sarga admitted that he lied at the debriefing about his reasons for being in New Orleans in connection with the instant charges. (Vol. 1, 108)

---

[28]See AUSU Bahnsen's March 31, 1992, letter.

19. AUSA Bahnsen insisted that no 5K1.1 substantial assistance motion would be made without full and complete cooperation. (Government's Exhibit 3, Letters of January 27, 1992 and March 20, 1992; Vol. 1, 174-75)

20. At that time of the guilty plea hearing, Sarga knew he faced a level 38 guidelines sentence for the offense. (Vol. 1, 113) Sarga testified he assumed he would receive a 3-level adjustment for acceptance of responsibility. (Vol. 1, 113)

21. Sarga testified that his guilty plea had nothing to do with Shreve; he pled guilty because there were {too many people in there who could get me convicted on a conspiracy charge." (Vol. 1, 112)[29]

22. Sarga educated himself about the sentencing guidelines through a book that he purchased. (Vol. 1, 68) Sarga "kind of knew where things were falling and was "pretty much aware of them [the guidelines] at that time." (Vol. 1, 68)

23. At the section 2255 evidentiary hearing, Sarga admitted to being "evasive" at the December 29, 1992, sentencing

[29]Shreve entered his plea on October 27, 1992. (See Doc. No. 250; Doc. No. 452). Sarga pled guilty on September 17, 1992.

hearing. (Vol. 1, 122) Sarga admitted that he was attempting to hide property from the Government. (Vol. 1, 122)

24. Levine never counseled Sarga to lie on the stand or to be evasive; that was Sarga's decision. (Vol. 1, 125) Levine advised Sarga of the pitfalls of cross-examination and did not know Sarga was lying on the stand. (Vol. 1, 202-03)

25. At the continuance of the December 1992 sentencing hearings, neither Sarga nor Levine had reason to believe that the Government would obtain information pursuant to a search warrant in Louisiana on or about January 21, 1993, which would be used to further discredit Sarga the final sentencing hearing. (Vol. 1, 203)[30]

26. Sarga wrote two letters to the District Judge, one typewritten letter dated December 10, 1992, and another, a handwritten, but undated letter, apparently written between the 1992 and 1993 sentencing proceedings. (Vol. 1, 98, 99, 201; Court's Exhibits 1 and 2)

27. Sarga wrote the December 10, 1992, letter to explain to Judge Merryday his position in this conspiracy and "giving him a

---

[30]*See* Doc. No. 253, p. 1 paragaph 4.

little bit of the past of my history and that I didn't come before him pretending to be an innocent bystander." (Vol. 1, 98) Sarga testified that he did not have a discussion with Levine about whether he should write to the Judge or what he should write to the Judge. (Vol. 1, 98) He testified that he wrote th letter while he was in jail and mailed it to Levine. He did not include any instructions. (Vol. 1. 98) However, Sarga testified that he asked Levine "ahead of time if I could write a letter to him... and he said I could ... so I wrote him a five-page letter." (Vol. 1. 98) Sarga testified that his expectation as that the letter would just get forwarded. (Vol. 1. 99) He also testified that Levine did not counsel him on what to say in the letter. (Vol. 1. 99)

28. Sarga testified that in his second letter he was attempting to explain "again what happened and the fiasco that happened in January and I was trying to explain that to him, and again, describe my position in the conspiracy and my part in reasoning for doing what I did in -- in December 29th and 30th." (Vol.

1, 99)[31]

29. Neither Sarga nor Levine expected that Sarga would receive a life sentence. Sarga testified that, in hindsight, he would have fled in 1991 if he had fully appreciated how federal sentencing law had changed since he had been a fugitive on the 1975 federal charges. (Vol. 1. 103)

30. Appellate counsel Bradley Stark (Stark), who testified by telephone, stated that he felt Sarga received a life sentence because he lied about his assets when he testified at the sentencing hearing. (Vol. 2, 15) Stark did not raise any issue on appeal regarding prosecutorial misconduct; he could not recall his reasons for not doing so. (Vol. 2, 6-7)

31. At the section 2255 evidentiary hearing, Sarga presented the testimony of Attorney William Norris as an expert witness.

32. While opining that Levine's performance was deficient in allowing Sarga to be debriefed outside of Levine's

[31] At the April 28, 1993, sentencing haring the District Judge admitted into evidence the Government's photographic exhibits (See Doc. Nos. 286 and 291) to respond to paragraph 3 of Sarga's December 10, 1992 letter. These photographs depict Sarga with guns, money, and marijuana.

presence, Norris conceded that Levine believed that the prosecutor had agreed to a limited debriefing. (Vol. 2, 32, 41, 49)

33. Norris also conceded that it is common practice for prosecutors to insist that a defense attorney be absent from a debriefing once the initial ground rules of the debriefing are established. (Vol. 2, 54)

34. Norris also suggested that it was "unwise" for Levine to call Sarga as a witness at the sentencing hearing to address his minimal role in the conspiracy. (Vol. 2, 39, 62) Norris acknowledged, however, that it was ultimately Sarga's decision whther to take the stand. (Vol. 2, 63)

Conclusions of Law

To prevail on a claim of ineffective assistance of counsel, Sarga "must snow that counsel's performance fell below constitutional standards and that his defense was prejudiced as a result." *Caderno v. United States*, 256 F.3d 1213, 1217 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 1185 (2002) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Stated another way, "[in]effective assistance exists if: (1) counsel's performance was

objectively unreasonable; and (2) a reasonable probability exists that the outcome would have been different absent the deficiency." *Id.* (citing *Strickland*, 466 U.S. at 691). The burden is on the Defendant to demonstrate the denial of effective assistance of counsel. *United States v. Cronic*, 466 U.S. 648, 658 (1984) Deficient performance is performance which is objectively unreasonable under prevailing professional norms. *Strickland*, 466 U.S. 688. Prejudice results when there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The Government contends that Sarga's statements under oath at the Rule 11 colloquy that he was fully satisfied with Levine's representation bars any claim of ineffective assistance relating to any events up to that stage in the proceedings. This argument has considerable merit. *See Dukes v. Warden*, 406 U.S. 250, 257 (1972) (defendant's allegation that counsel had conflict of interest that invalidated plea was without merit; Defendant never complained to

the Court that he was not satisfied with counsel's representation even when Defendant knew counsel was representing two Defendants; in fact; Defendant told the Court he was satisfied with the representation of his counsel).

Accordingly, this Court would be justified in refusing to consider the merits of any Sixth Amendment claims other than the alleged deficiencies of counsel after the guilty plea hearing. However, in order to provide a complete analysis to the Court, the pre-guilty plea ineffective assistance of counsel claims are analyzed on the merits, in the alternative.

A. Ineffective Assistance of Counsel Claim - Conflict of Interest

Sarga claims that Levine had multiple conflicts of interests, having represented Shreve, the alleged Government's chief witness against Sarga, and approximately two dozen other related individuals, and also had a conflict of interest regarding Levine's personal business dealings with Sarga.

An attorney's conflict of interest may deprive a defendant of his Sixth Amendment right to assistance of counsel during a criminal

trial. *See Mickens v. Taylor*, 122 S. Ct. 1237, 1240 (2002). However, to establish ineffective assistance of counsel due to a conflict of interest, Defendant must demonstrate that an actual conflict of interest adversely affected his attorney's performance. *Id.* At 1238 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 348-49 (1980)).

The harm from representing conflicting interests lies not just in what the attorney does but also in what he advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pre-trial plea negotiations, and in the sentencing process. *United States v. Jones*, 52 F.2d 395 (11th Cir. 1995); *Porter v. Wainwright*, 805 F. 2d 930 (11th Cir. 1986). If a Defendant establishes both that an actual conflict of interest exists and that the conflict adversely affected counsel's performance, prejudice is presumed. *Burden v. Zant*, 24 F.3d 1298 (11th Cir. 1994); *Danner v. United States*, 820 F.2d 1166 (11th Cir. 1987); *Porter v. Singletary*, 14 F.2d 554 (11th Cir. 1994).

However, a possible, speculative, or hypothetical conflict does not suffice to impugn a criminal conviction. *Burden*, 24 F.3d at 1305. A Defendant must point to specific instances in the record

that suggest an impairment or compromise of his interests for the benefit of another party. *Porter*, 14 F.3d at 560. A conflict remains hypothetical and cannot form a basis for relief unless the Defendant makes this showing. *Porter*, 14 F.3d at 561.

A Defendant must show "inconsistent interests and must demonstrate that the attorney made a choice between possible alternative courses of action, such as eliciting, or failing to elicit, evidence helpful to one client but harmful to the other." *Smith v. White*, 815 F.2d, 1401, 1404 (11th Cir.), *cert. denied*, 484 U.S. 863 (1987) (quoting *Barham v. United States*, F.2d 1529, 1532 (11th Cir.) (citations omitted), *cert. denied*, 467 U.S. 1230 (1984)). A conflict may arise from a lawyer's simultaneous or successive representation of adverse interests. Whether the representation is simultaneous or successive representation of adverse interests. Whether the representation is simultaneous or successive does not conclusively determine the questions of actual conflict; it is generally easier to prove actual conflict arising from simultaneous representation than from successive representation. *Smith v. White*, 815 F.2d at 1405.

Under the Rules Regulating the Florida Bar, to establish a

conflict of interest the representation must be in "the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client . . . ." Florida Bar Rule 4-1.9

Sarga has failed to show that Levine's representation of Shreve in a 1975 Georgia marijuana case had any connection to the 1992 Tampa charges against Shreve and Sarga involving a 400 kilogram cocaine conspiracy.

Sarga's allegation that Levine represented Shreve in an earlier case does not demonstrate that Levine labored under an actual conflict of interest in representing Sarga. Evaluating a conflict is a fact-specific inquiry and Sarga should point to specific instances in the record that suggest Levine compromised Sarga's interests because he once represented Shreve. *United States v. Novaton*, 271 F.3d 968, 1010-11 (11th Cir. 2001); *Porter v. Singletary*, 14 F.3d at 560. Sarga has not done so. Therefore, any conflict related to Levine's previous representation of Shreve remains hypothetical and cannot form a basis for relief. *Porter*, 14 F.3d at 561.

Furthermore, Sarga has not shown that Levine had

"inconsistent interests" in the present case related to his previous representation of Shreve, and has not demonstrated that Levine chose between possible alternative courses of action, such as eliciting, or failing to elicit, evidence helpful to Shreve but Harmful to Sarga. *Smith v. White*, 815 F.2d at 1404.

Likewise, Sarga has failed to show that Levine labored under an actual conflict of interest because of his earlier representation of the two dozen other defendants who were never clearly identified. At most, Sarga has alleged a possible, speculative, or hypothetical conflict. *Burden v. Zant,* 24 F.3d 1298; *see Pegg v. United States*, 253 F.3d 1274, 1277 (11th Cir. 2001), *cert. denied,* 122 S.Ct. 1435 (2002) ("A § 2255) petitioner must show 'inconsistent interests and must demonstrate that the attorney made a choice between possible alternative causes of action . . . .'".). Sarga has not shown that in representing him, Levine had inconsistent interests vis-a-vis these other unidentified clients.

Nor has Sarga demonstrated that Levine's personal business dealings with Sarga constituted an actual conflict of interest that adversely affected Levine's performance. Levine's testimony that he

was not paid for his services in this case and that the land transfer was in payment for a fee in a prior case is credible; therefore, Sarga's allegations that the land transfer caused Levine to structure his representation to avoid disclosure of the Pasco County land transaction because the transaction constituted an actual conflict of interest has no merit. Sarga has also failed to support by credible evidence his allegation that "Levine's business dealings with Sarga and others, if disclosed by Sarga in a truthful, complete debriefing, could have led to either criminal or ethical liability or both for Levine." *See Pegg*, 253 F.3d at 1278 (although defense counsel suffered from a conflict of interest, there was no showing that this contributed in any way to defendant's decision to enter a guilty plea; the court rejected the defendant's invitation to make this a *per se* conflict which obviates the need to show prejudice.).[32]

Furthermore, Sarga has not alleged nor shown that Levine was under investigation or that he would have wanted to curry favor

[32] Even where an attorney may be considered by the government to be an unindicted co-conspirator in an unrelated case does not mean that there is a prejudicial conflict. While the conflict may be actual, absent a showing that the attorney's advocacy was affected by this conflict, there will be no basis for setting aside the verdict. United States v. Novaton, 271 F.3d 968 (11th Cir. 20010, cert. Denied, 122 S.Ct. 2345 (2002).

with the Government as a result of any of the business dealings Sarga describes.[33] Sarga has failed to allege any facts to support his claim that disclosure of Levine's business dealings with Sarga and others in a truthful, complete debriefing could have led to either criminal or ethical liability against Levine.[34] The record and testimony at the evidentiary hearing shows that Levine did not labor under an actual conflict of interest in his representation of Sarga, Shreve, or other drug clients or due to his business dealings with Sarga's associates.[35]

The preponderance of credible evidence does not support Sarga's claim that Levine had an actual conflict of interest which adversely affected his performance as Sarga's attorney in this case.

B. Ineffective Assistance of Counsel at Debriefing through

---

[33] Even if Sarga's testimony were credited regarding Levine's involvement in Sarga's financial dealings in the 1970's to disguise drug funds, that conduct was too remote in time to support a finding that he was actively representing conflicting interests in the 1992 prosecution of Sarga. *See Mickens v. Taylor*, 122 S. Ct. At 1245.

[34] Sarga suggests that the Florida Bar could have initiated disciplinary proceedings and the Government might have taken action against Levine.

[35] Levine was found to be ineffective because he labored under an actual conflict of interest in United States v. Alvarez, 580 F. 2d 1251 (5th Cir. 1978). However, the facts of this case are distinguishable from Alvarez. In Alvarez, Levine was simultaneously representing several clients. In the present case, Levine was representing Sarga only. Although Levine had represented Shreve in a previous case, the previous case was totally unrelated to the present case. Levine did not represent Shreve in the present case.

Sentencing

1. Debriefing

Sarga contends that trial counsel was ineffective when he permitted Sarga to believe that he could be debriefed even though the terms of the cooperation agreement were not finalized and Sarga was given to understand that certain guarantees about his cooperation had been given. Sarga also contends that Levine was ineffective in failing to attend the debriefing.

Because a lawyer is presumed to be competent to assist a defendant, the burden is on the accused to demonstrate the denial of the effective assistance of counsel. United States v. Cronic, 466 U.S. at 658. Sarga cited *United States v. Ming He*, 94 F.2d 782 (2d Cir. 1996) in support of his claim that Levine was ineffective for being absent from the debriefing. In *Ming He*, the Second Circuit held that the government's standard practice in the Eastern District of New York of conducting debriefing interviews outside the presence of counsel, absent a waiver, was inconsistent with the fair administration of justice. *Id.* at 793.[36] Exercising its supervisory

[36] The court declined to decide the constitutional issue of whether the absence of counsel at the debriefing was a Sixth Amendment violation. *Id.* at 785.

authority, the court vacated the sentence of a defendant who was debriefed without his attorney and subsequently sentenced based o his lack of candor at the debriefing. *Id.* at 785.[37]

Ming He is distinguishable from this case because it was Sarga's untruthful testimony at the sentencing hearing, not the failed debriefing, which led to his life sentence. The District Judge in this case unequivocally found so at the April 1993 sentencing.

Further, even if this court were to find that Levine's failure to attend the debriefing were deficient performance under *Strickland*, Sarga's claims would not prevail because he has not demonstrated a reasonable likelihood of a different outcome either in terms of his conviction or sentence. First, the prosecutor made it clear that Levine could not be present. Second, she offered another opportunity for a debriefing after the motion to enforce plea agreement was denied. Third, Sarga was adamant about providing limited cooperation and it would be speculative to find that Levine's presence at the debriefing would have led to a different result. He also knew that AUSA B[illegible]nsen's position was that he could not be

[37] The Eleventh Circuit has apparently not decided this issue.

present except for the initial stage where "ground rules" were discussed. Sarga's expert witness, William Norris, opined that Levine's failure to attend the debriefing was wrong, yet he conceded that prosecutors often insist that a defense attorney no attend a debriefing. Sarga has not shown that Levine's presence at the debriefing would have caused him to provide complete information to the Government. Therefore, the claim of ineffective assistance du to Levine's failure to attend the debriefing session does not meet the prejudice prong of the *Strickland* test.

Sarga also contends that Levine was ineffective in not insuring prior to the debriefing that the Government had agreed to a limited debriefing. The series of letters between Levine and AUSA Bahnsen did not evidence a meeting of the minds, according to Judge Castagna's order denying the motion to enforce plea agreement. Even William Norris, Sarga's expert witness, conceded that Levine believed that the Government had agreed to a limited debriefing.

Accordingly, this second aspect of Sarga's ineffective assistance claim relating to the debriefing is similarly without merit and is not deficient performance under the first prong of the

Strickland test.

2. Motion To Enforce Plea Agreement

Sarga claims that Levine was ineffective because he failed to secure Sarga's presence at a hearing regarding Sarga's motion to enforce the plea agreement and to call Sarga as a witness. Sarga has failed to establish that Levine's performance was deficient in this regard or that, if deficient, it prejudiced the outcome of his case.

The Court had the letters from Levine and the Government. Sarga had not shown what testimony he could have introduced that would have likely caused the Court to grant his motion to enforce the plea agreement.

3. Guilty Plea

Sarga claims that Levine was ineffective relative to the entry of his guilty plea by permitting Sarga to plead "open" to the charge. However, at the guilty plea hearing, Sarga stated that he was satisfied with counsel's representation. Moreover, Sarga did not plead open to all charges, but only as to the conspiracy count.

"[I]f the Rule 11 plea taking procedure is careful and detailed, the defendant will not later be heard to contend that he swore

falsely." *United States v. Stitzer*, 785 F.2d 1506, 1514 n.4 (11th Cir.), *cert. denied*, 479 U.S. 823 (1986). The statements of a defendant in open court are presumed to be true. *United States v. Gonzalez-Mercado*, 808 F.2d 796, 800 n.8 (11th Cir. 1987); *Downs-Morgan v. United States*, 765 F.2d 1534, 1541 n.14 (11th Cir. 1985). Because a defendant's statements concerning plea consequences at the time of plea are considered "persuasive evidence," they are not overcome by the defendant's bald assertion of misunderstanding. *Harvey v. United States*, 850 F.2d 388, 396 (8th Cir. 1988).

After a conviction based on a guilty plea has become final, a Defendant may challenge only the knowing and voluntary nature of the plea, unless the record demonstrates that the district court lacked the power to enter the conviction or impose the sentence. *United States v. Broce*, 488 U.S. 563; *United States v. Kaiser*, 893 F. 2d 1300 (11th Cir. 1990).

The Defendant is barred from raising a challenge to the factual basis of his plea in a 28 U.S.C. § 2255 motion. *See Wilson v. United States*, 962 F.2d 996, 997 (11th Cir. 1992). In the context of a Section 2255 motion, "a defendant who enters a plea of guilty

waives all nonjurisdictional challenges to the constitutionality of the conviction, and only an attack on the voluntary and knowing nature of the plea can be sustained." *Id.*

Sarga does not dispute that he had close assistance of counsel and that the Magistrate Judge complied fully with Rule 11 at the re-arraignment. Sarga maintains that the plea was not knowing and voluntary because he could not have foreseen at the time he entered his plea, or even at the initial sentencing, the severity of the sentence he would receive. Sarga asserts that because he was prejudiced at sentencing, he is entitled to withdraw his plea to seek a plea agreement or a correction of his sentence.

Since Sarga received close and adequate assistance of counsel[38] and entered his plea knowingly and voluntarily, his subsequent dissatisfaction with the severity of his sentence is not a sufficient ground for withdrawal of the plea. *United States v. Elias*, 937 F.2d 1514, 1520 (10th Cir. 1991); *United States v. Badger*, 925 F.2d 101, 104 (5th Cir. 1991).

---

[38] The District Judge, in denying Sarga's motion to withdraw plea filed after sentencing specifically found that Sarga had close assistance of counsel. (Doc. No. 361)

Furthermore, Sarga has not proven and cognizable claim of ineffective assistance of counsel prior to and in connection with Sarga's plea of guilty. Sarga admitted at the section 2255 evidentiary hearing, that when he entered his guilty plea, on September 17, 1992, he was "happy" with Levine's representation. This testimony is consistent with his sworn responses at the guilty plea hearing that he was satisfied with counsel's representation. At that time of the guilty plea hearing, Sarga knew he faced a level 38 guidelines sentence fo the offense, but assumed he would receive credit for acceptance of responsibility. Sarga did not object to the factual basis of his plea at the hearing and he acknowledged that the Court could impose the maximum sentence of life. He also acknowledged that if his sentence were different from what he expected, including any prediction of counsel, that he could not withdraw his plea. *See United States v. Pease*, 240 F.2d 938, 941 (11th Cir. 2001), *cert. denied*, 122 S.Ct. 381 (2001).

In the guilty plea context, to establish prejudice under the *Strickland* standard, the Defendant must show that there is a reasonable probability that, but for counsel's errors, he would not

have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52 (1985). However, counsel owes a lesser duty to a client who pleads guilty than to one who goes to trial, and counsel need only provide his client with an understanding of the law in relation to the facts, so that the accused may make an informed and conscious choice between accepting the prosecution's offer and going to trial. *Wofford v. Wainwright*, 748 F.2d 1505, 1508 (11th Cir. 1984). Sarga has never stated that he would not have pled guilty and insisted on going to trial absent Levine's alleged errors. Instead, he testified that he would have fled and become a fugitive in 1991.

Sarga has not shown that counsel was ineffective in connection with the guilty plea proceedings.[39]

4. Sentencing

Sarga claims Levine was ineffective because he allowed Sarga to testify at the sentencing hearing and did not fully counsel

[39] In *Esslinger v. Davis*, 44 F.2d 1515, 1530, (11th Cir. 1995), a 28 U.S.C. § 2254 case, the court found that defense counsel was ineffective for recommending that Esslinger enter a blind plea. Esslinger's counsel failed to fully investigate Esslinger's criminal history; counsel did not inquire of the District Attorney's office and the probation office as he usually did. *Id.* At 1529. Neither counsel nor Esslinger knew that, based on his prior record, Esslinger faced a *mandatory* sentence of ninety-nine years or life by pleading guilty. *Id.* at 1530. Furthermore, counsel was not candid with the court at the state evidentiary hearing on ineffective assistance of counsel. *Id.*

Sarga as to the consequences of Sarga's testimony. Sarga cannot show ineffective performance or prejudice on the part of Levine under the *Strickland* test.

Ultimately, it was Sarga's decision whether or not to testify at the sentencing hearing. *See United States v. Teague*, 953 F.2d 1525, 1527 (11th Cir. 1992) (every criminal defendant is privileged to testify in his own defense, or to refuse to do so; the decision whether a criminal defendant should testify ultimately rests with defendant.).

William Norris, Sarga's expert witness, conceded that the decision to testify rests with the client.

Sarga does not allege that counsel failed to advise him of his right not to testify. Levine testified that he would not have allowed Sarga to testify at the sentencing hearing unless Levine had counseled Sarga and that he did counsel him. Sarga has not refuted that testimony. Sarga wanted to try to convince the Court that he should not be identified as a manager in the smuggling conspiracy and that a favorable role adjustment should be made. Sarga decided to testify in the sentencing proceeding after discussing testifying with

Levine.

In retrospect, Sarga's decision to testify at the sentencing backfired. Had he not testified, the District Judge arguable would have not imposed a two-level adjustment for obstruction of justice or denied a two-level adjustment for acceptance of responsibility.

However, in assessing whether counsel's performance was deficient under the *Strickland*, standard, the Court must make "every effort to eliminate the distorting effect of hindsight, to reconstruct the circumstances of counsel's perspective at the time." *Williams v. Head,* 185 F.3d 1223, 1238-39 (11th Cir. 1999) (quoting *Strickland*, 466 U.S. a t 689). Levine's decision to call Sarga as a witness at the sentencing hearing to challenge the recommended three-level adjustment for the role in the offense did not fall below an objective standard of reasonableness.[40] *Strickland*, 466 U.S. at 669.

Further, after Sarga received a life sentence, Levine vigorously challenged it by filing a motion to withdraw plea. Overall, Levine's performance as Sarga's trial counsel was not

[40] Judicial scrutiny of counsel's performance must be highly deferential. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 669.

deficient.

Sarga was not unfairly prejudiced at sentencing by any of Levine's actions. Prior to the second sentencing hearing, the Government notified Sarga of the evidence it intended to offer and of the enhancement it would seek. At the sentencing hearing, Sarga had the opportunity to cross-examine and present evidence and argument. In fact, at the April 28, 1993, hearing, prior to the imposition of the sentence, Sarga presented the same argument against the admission of the additional evidence that he made before the Court at the August 9, 1994, hearing on the motion to withdraw plea.

By alleging that Levine was ineffective in allowing him to testify, Sarga cannot overcome the fact that he lied to the Court Levine did not know that Sarga was going to lie and did not tell him to lie. Therefore, this claim fails because Sarga cannot show ineffective performance or prejudice on the part of Levine under the *Strickland* standard.

C. Prosecutorial Misconduct

Sarga claims that AUSA Bahnsen committed prosecutorial

misconduct because she knew of the conflicts under which Levine labored and because she debriefed Sarga outside of the presence of Levine without obtaining a waiver of Levine's presence.

Sarga's claim of prosecutorial misconduct is foreclosed by the entry of the guilty plea and is procedurally barred.

Guilty pleas waive all but jurisdictional claims up to the time of the plea. *Tollett v. Henderson*, 411 U.S. 258, 266-67 (1973); *Stano v. Dugger*, 921 F.2d 1125, 1150 (11th Cir.), *cert. denied*, 502 U.S. 835 (1991). This waiver includes constitutional claims. *Wilson v. United States*, 962 F.2d 996 (11th Cir. 1992) (pre-plea ineffectiveness waived); *Dermota v. United States*, 895 F.2d 1324, 1326 (11th Cir.) (double jeopardy claim waived), *cert.denied*, 498 U.S. 837 (1990). Moreover, guilty pleas foreclose most claims from collateral attack. *See, United States v. Broce*, 488 U.S. 563, 569 (1989); *Dermota v. United States*, 895 F.2d at 1326. Therefore, Sarga's prosecutorial misconduct claim is waived.

Furthermore, " . . . an available challenge to a criminal conviction or sentence must be advanced on direct appeal or else it will be considered procedurally barred in a § 2255 proceeding."

Mills v. United States, 36 F.3d 1052, 1055 (11th Cir. 1994), *cert. denied*, 514 U.S. 1112 (1995).

A claim of ineffective assistance of counsel constitutes sufficient cause to escape the procedural bar which would otherwise block § 2255 claims not raised on direct appeal. *Greene v. United States*, 880 F.2d 1299 (1tth Cir. 1999). A Defendant is entitled to effective assistance of counsel in his direct appeal. *Evitts v. Lucey*, 469 U.S. 387 (1985). A Defendant has satisfied the prejudice prong of *Strickland* when he or she can show that appellate counsel's performance was sufficiently deficient to deprive the defendant of "a trial [or an appeal] whose result [was] reliable." *Strickland*, 466 U.S. at 687. An effective appellate advocate is not required to raise every non-frivolous appellate issue. Effective advocates "winnow out" weaker arguments even though the weaker arguments even though the weaker arguments may be meritorious. *Heath v. Jones*, 941 F.2d 1126, 1132 (11th Cir. 1991), *cert. denied*, 502 U.S. 1077 (1992).

Sarga has not shown that appellate counsel Bradley Stark was deficient in failing to raise the prosecutorial misconduct issue nor has he shown that this issue would have had a reasonable

probability of success on appeal. *See Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir.), *cert denied* , 498 U.S. 849 (1990). Thus, he has not demonstrated "cause" to excuse the procedural default by not raising the claim of prosecutorial conduct on direct appeal.

D. Failure To Accept Guilty Plea

Finally, to the extent that Sarga claims he is entitled to relief because the District Judge failed to accept his plea of guilty, this claim is without merit. See generally, *United States v. Ciapponi*, 77 F.2d 1247, 1251 (10th Cir. 1996) ("it is implicit in the sentencing record, which includes the presentence investigation, that the district judge reviewed the facts of the case against defendant and the basis for his guilty plea.").

In the present case, the Honorable Steven D. Merryday implicitly accepted Sarga's guilty plea. (Doc. No. 256, p. 6). Levine stated at the April 28, 1993, sentencing hearing that the guilty plea had been accepted. (Doc. No. 345, p. 69)

Furthermore, Sarga did not present this claim at the evidentiary hearing except in closing argument. In addition, the

claim is procedurally barred because it was not raised on direct appeal, and the Eleventh Circuit found that there was no plain error relative to this claim. (See Doc. No. 395)

E. Other Issues

Any issues raised in a belated fashion relating to Levine's discussion of the sentencing guidelines with Sarga or the amount of time Levine spent counseling Sarga are not clearly raised in the amended motion to vacate or the pre-evidentiary hearing stipulation. Accordingly, they will not be further addressed.

Any other claims or arguments raised in the amended motion to vacate, set aside, or correct an allegedly illegal sentence not specifically addressed in this Report and Recommendation have been considered and rejected.

Conclusion

Sarga's guilty plea statement under oath that he was satisfied with Levine's performance bars any claim of ineffective performance prior to that date. Alternatively, the Sixth Amendment claims should be denied on the merits. Levine did not labor under an actual conflict of interest by representing Shreve in a previous unrelated

case, nor did he labor under an actual conflict of interest by representing Sarga after representing unnamed defendants in previous cases. Likewise, Levine did not labor under an actual conflict of interest due to the alleged financial business dealings between Levine and Sarga. Therefore, Levine was not ineffective due to an actual conflict of interest.

Furthermore, Levine was not ineffective in connection with the failed debriefing. Sarga has failed to establish the likelihood of a different outcome if Sarga had been present. Nor has Sarga proved that Levine's other actions in connection with the failed debriefing met the prejudice prong of the *Strickland* standard. In addition, Levine was not ineffective for failing secure Sarga's presence at the motion to enforce plea held before the Honorable William J. Castagar because all information needed for the Court to rule on the motion was contained in the letters between AUSA Bahnsen and Levine.

Finally, Levine was not ineffective for allowing Sarga to testify at the sentencing hearing. Sarga chose to testify and Levine counseled him before Sarga did so. Levine did not tell Sarga to lie

and did not know that Sarga was going to lie on the stand. There has been no showing that Levine's performance was prejudicial to the defense.

Sarga's claim of prosecutorial misconduct is barred by the entry of his guilty plea and is procedurally defaulted because he did not raise the claim on direct appeal.

It is therefore RECOMMENDED

That Sarga's motion to vacate, set aside, or correct an allegedly illegal sentence (Doc. No. 423) be denied with prejudice.

Respectfully submitted this 21st day of March 2003.

/s/ Elizabeth A. Jenkins
Elizabeth A. Jenkins
United States Magistrate Judge

NOTICE TO PARTIES

Failure to file written objections to the proposed findings and recommendation contained in this report within ten days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal and a *de novo* determination by a district judge. *See* 28 U.S. C. § 636 (b)(1); Fed. R. Civ. P. 72; *see also*, Fed. R. Civ. P. 6; M.D. Fla. R. 4.20.

cc:
Hon. Steven D. Merryday
Counsel of record
SA/sm